No. 85-1553

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Petitioner,

—against—

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, and LUCILLE WILLIAMS, City Clerk of the City of Clearwater,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether federal courts are required to hear and decide facial overbreadth challenges to municipal ordinances which impose impermissable restrictions on the free exercise of religion, where the facts conferring standing to raise such a challenge are both sufficient and undisputed.

2. Whether a local ordinance which, requires churches to obtain permits before soliciting donations from their own members on their own premises, mandates specific forms of religious doctrine and policy and, requires churches to submit to massive reporting and disclosure requirements unrelated to any legitimate governmental interest, is constitutional on its face.

Parties to the Proceedings Below

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were:

The Church of Scientology Flag Service Org., Inc.

Americans United For Separation of Church and State

City of Clearwater, Florida

Thomas Bustin, City Attorney of the City of Clearwater

Lucille Williams, City Clerk of the City of Clearwater

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No. 85-

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OCTOBER TERM, 1985

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

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—against—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Church of Scientology Flag Service Org., Inc. (the "Church") hereby petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in so far as that decision vacated the court of appeals' prior order granting the Church leave to appeal pursuant to 28 U.S.C. § 1292(b), on the ground that there were insufficient facts in the record to establish the Church's standing to bring a facial challenge to Ordinance No. 3479-84 and, in so far as that decision declined to review the merits of the Church's challenge.

Opinions Below

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 777 F.2d 598. (App. A,

A1-A49). The opinion of the district court on the facial validity of Ordinance No. 3479-84 is not reported. (App. D, D1-D16). The opinion of the district court on the facial validity of Ordinance No. 3091-83 is not reported. (App. B, B1-B23).

Jurisdiction

The opinion of the court of appeals was issued on November 13, 1985.[1] On December 19, 1985, the court of appeals denied the Church of Scientology Flag Service Org., Inc.'s petition for rehearing and suggestion for rehearing *en banc*. (App. I, I1-I2). This petition is being filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Ordinances Involved

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article III Section 2 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .

Clearwater Ordinance No. 3479-84 is reproduced in its entirety in Appendix J to this Petition.

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[1] The court did not enter a judgment on its decision in this case because its opinion vacated the order that granted permission to appeal under 28 U.S.C. § 1292(b).

Statement of the Case

In March of 1984, the City of Clearwater, Florida enacted Ordinance No. 3479-84. This ordinance, which purports to regulate charitable solicitations in the City of Clearwater is unique in modern American History in the manner in which it intrudes into the relationship between churches and their members, in which it mandates particular forms of church governance and in which it authorizes comprehensive state surveillance of internal church activities and expenditures.

Unlike every other solicitation ordinance presently in effect throughout this nation, Ordinance No. 3479-84 requires churches to obtain licenses prior to soliciting contributions from their own *members* on their own premises. As part of this licensing scheme, churches must report on and account to the City for all such contributions solicited from members, and provide detailed information concerning the amount, nature and purpose of all expenditures made by the church, and the names, addresses and telephone numbers of all persons involved in the solicitation and disbursements of funds. Section 100.03 (J20-J35).[2] Further, the ordinance requires that all churches which give refunds of money solicited establish a written policy setting forth the terms and conditions under which a refund will be granted and that the church comply with the refund requirements within sixty days. Section 100.05(f) and (g). (J41-J42).

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[2] As an alternative, churches may obtain a license to raise funds from their own members by making such information available directly to their members, and not in their license application. A member may complain to the City if he believes that his church has not provided sufficient or accurate information, whereupon the City may investigate, including by compulsory process, the financial affairs of the church to determine if it has complied. Sections 100.02(3) and 100.06. (J18-J20, J45-J48).

Aside from its intrusive regulation of matters which rightly concern only the church and its members, Ordinance No. 3479-84 imposes massive recordkeeping and disclosure requirements on churches as a condition for soliciting donations from the public in Clearwater. Section 100.03. (J20-J35). In order to satisfy these requirements an organization must disclose, *inter alia,* the names, addresses, and telephone numbers of all persons soliciting funds or responsible for their disbursement; a brief description of the organization; the purpose of the solicitation and an "explanation of the intended use of the funds toward that purpose"; the "methods and means" of solicitation; a schedule "of salaries, wages, fees, commissions, expenses and costs" to be expended not only in the solicitation of the funds, but also "in connection with their disbursement"; a list of all other cities in Florida in which the organization has collected funds over the previous five years; as well as additional information. Section 100.03 (1)(a-o). (J21-J28). Moreover, the City does not require this information solely with respect to solicitations by churches for specific identified charitable purposes; rather churches must account for each and every solicitation and disbursement of funds raised to support the day-to-day operations of the church itself.

Finally, Ordinance No. 3479-84 does not define the conditions under which the City Clerk can grant or deny permit applications, section 100.03(2) and (3), (J28-J31), and empowers the City Attorney to launch searching investigations into the internal affairs of churches and other First Amendment organizations without any limits or standards set on this authority. In furtherance of such investigations, the ordinance authorizes the City Attorney not only to subpoena persons, records and documents, without court order, and to make these documents available to the public, but to inquire into the motives of churches in soliciting contributions. Section 100.06. (J44-J48).

Procedural History

Ordinance No. 3479-84 was not the first charitable solicitation ordinance to be enacted by the City of Clearwater.

In 1983, after almost two years of debate, the City adopted its first charitable solicitation ordinance, Ordinance No. 3091-83. That ordinance, like its successor Ordinance No. 3479-84, the subject of the instant petition, was directed principally at the Church of Scientology which maintains its international center for the provision of its highest levels of religious services in Clearwater.

In January of 1984, just prior to the effective date of Ordinance No. 3091-83, the Church filed a verified complaint[3] in the United States District Court for the Middle District of Florida, seeking an order enjoining the enforcement of the ordinance on the grounds that it was unconstitutional on its face and as applied.[4]

The Church then moved for a temporary restraining order[5] and a preliminary injunction. In March of 1984, the court held a hearing on the Church's motion for a preliminary injunction which was limited to the Church's facial challenge.[6] The evening before post-hearing memo-

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[3] A virtually identical challenge to Ordinance No. 3091-83 was filed by Americans United For Separation of Church and State (hereinafter "Americans United"). Americans United's case was heard together with the Church's challenge to Ordinance No. 3091-83 both in the district court and in the court of appeals. The court of appeals' decision in Americans United's case, No. 84-3236, however is not at issue herein.

[4] The Church's claim was brought pursuant to 42 U.S.C. § 1983. The district court's jurisdiction over these claims was conferred by 28 U.S.C. § 1331 (1982) and 28 U.S.C. § 1343(a)(3) (1982).

[5] The City agreed not to enforce the ordinance pending a determination of the Church's motion for a preliminary injunction.

[6] At this hearing, the City initially expressed some reservations about the Church's standing to litigate its claims arising under the religion clauses of the First Amendment. At the conclusion of the hearing it retracted its reservation and conceded the Church's standing to raise all of its claims.

randa were due to the court on the question of the ordinance's facial validity, the City, without any prior notice to the court or the parties, amended Ordinance No. 3091-83 by enacting Ordinance No. 3479-84.[7] Due to the temporary nature of Ordinance No. 3479-84, the district court ruled on the constitutionality of the original ordinance, finding it unconstitutional on its face. The court found that Ordinance No. 3091-83 was unconstitutional because, *inter alia*, it regulated solicitations by churches of their own members on their own premises. In so holding the Court stated:

> Regulations concerning solicitations must be limited to those solicitations of the public in public places. *International Society of Krishna Consciousness of Houston, Inc.* v. *City of Houston, Texas,* 685 F.2d 541 (5th Cir. 1982). Regulation of solicitations on the premises of a church or political association is not necessary because that activity could not disturb the public; there is not a danger of misrepresentation in those solicitations, by the organization for which contributions were sought. See City of Houston, supra at 562.

(B13).

Subsequently, the Church filed a supplemental complaint challenging the constitutionality of Ordinance No. 3479-84 on its face and as applied. (This case was assigned Court of Appeals No. 84-3574.)[8] The Church alleged the following facts to establish its standing to sue:

> 7. Plaintiff, Church of Scientology Flag Service Org., Inc. (hereinafter the "Church"), is a religious organ-

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[7] Ordinance No. 3479-84 was originally enacted as an emergency ordinance which would automatically expire at the end of ninety days if not passed as a non-emergency ordinance within that time.

[8] Americans United also filed a supplemental complaint challenging the new ordinance. Again the Eleventh Circuit's decision in Americans United's case, No. 84-3575, is not at issue herein.

> ization that maintains and operates a facility exclusively for religious training and spiritual counselling in the City of Clearwater. It follows, adheres to, and teaches the religious beliefs and practices of the religion of Scientology. All of its religious activities in the City of Clearwater are directed toward its members who come to the Church to avail themselves of the spiritual services offered here. It makes no attempt to solicit contributions from the general public of the City of Clearwater. It does, however, advertise and sell religious books and pamphlets about the religion of Scientology to members of the general public.
>
> 83. Defendants expressed intention to enforce the ordinance against Plaintiff has caused and continues to threaten irreparable harm to the First Amendment rights of the Plaintiff and its members to engage in dissemination of their religious ideas and philosophy and to practice their religious faith. . . .

(These identical facts were alleged by the Church in its original complaint challenging Ordinance No. 3091-83.) The City of Clearwater never filed an answer to the Church's complaint.

On July 13, 1984 the court, on its own motion, convened a hearing on the facial validity of the amended ordinance. At this hearing, the court asked the City whether it was challenging the Church's standing. The City's attorney replied without reservation: "we are not contesting standing today." (D8). At the conclusion of the hearing the court issued an oral ruling, finding the amended ordinance facially constitutional. The court gave no reasons or explanation for her conclusion. (D9-D16). Moreover, this ruling was particularly surprising since, as we demonstrate below, the amended ordinance suffered from the same constitutional flaw which the court had found rendered the original ordinance unconstitutional, *i.e.*, it regulates solici-

tations by churches of their own members on their own premises.

Ten days later, the court issued an order holding—again without a word of explanation—that amended Ordinance No. 3479-84 was facially constitutional, and certifying her ruling for appeal. (App. E, E1-E4). Upon the Church's motion, a panel of the Eleventh Circuit granted leave to appeal and, recognizing the probable merits of the Church's facial constitutional challenge, issued an order enjoining enforcement of the ordinance in its entirety pending the appeal.

On appeal, a different panel of the Eleventh Circuit reversed the prior panel's grant of leave to appeal, finding that the Church's challenge to the facial constitutionality of the statute was not ripe for review, (A41), because the district court had "answered a hypothetical, abstract question of law" and thus "an appellate ruling on the facial validity of the new ordinance would be purely advisory." (A45). The only articulated basis for the court of appeals' conclusion was that there purportedly was no evidence in the record regarding the Church's standing to bring its constitutional challenge, (A42-A43), and that there was no evidentiary or factual background in which to determine the facial constitutionality of the amended ordinance, (A44-A46).

In so ruling, the court of appeals not only ignored the undisputed facts in the record and fundamental principles of standing in the context of facial challenges brought under the First Amendment, but more importantly it declined to address the paramount and pressing issues of constitutional law presented by the merits of the Church's appeal.

Reasons for Granting Writ

1. As the mere description of Ordinance No. 3479-84 demonstrates, the Clearwater Ordinance is unique among charitable solicitation ordinances enacted by other states and localities, in its intrusion on, and violation of, the rights guaranteed by the First Amendment. As demonstrated in Point 2 below, not only does the ordinance violate the Establishment and Free Exercise Clauses of the First Amendment, but it regulates substantial amounts of protected activity and vests such unbridled discretion in City Officials that it is easily subject to arbitrary and discriminatory enforcement. Indeed, it is precisely because of ordinances like Ordinance No. 3479-84, that this Court has developed prudential standing principles to encourage and allow facial challenges to ordinances, in an effort to ensure that the "delicate", "vulnerable" and "supremely precious" First Amendment rights are given the "breathing space to survive." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

Despite a clear mandate by this Court to closely scrutinize ordinances on their face which so seriously infringe on and chill First Amendment freedoms, the court of appeals has avoided its duty and refused to address the merits of the Church's facial challenge. As a result, Ordinance No. 3479-84, already in effect for two full years, remains in force today and continues to threaten the exercise of First Amendment rights.

In support of its decision not to address the merits of the Church's challenge to the facial validity of Ordinance No. 3479-84, the court of appeals found that there were no facts in the record from which to determine whether the Church had standing to mount its challenge. In addition, the court of appeals held that the record was so devoid of factual and evidentiary material, that the district court's ruling was merely a hypothetical ruling of law "unasso-

ciated with the disposition of any claim." (A44). Finally, the court cited "the deeply rooted doctrine that questions of constitutionality not be reached unless strictly necessary", (A46), as a justification for avoiding review on the merits.

The court of appeals' holding seriously contravenes over forty years of precedent established by this Court regarding the nature of the facts required to establish standing and to adjudicate a facial challenge to an ordinance which, like Ordinance No. 3479-84, substantially regulates protected First Amendment activity. Recognizing that "the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech may be muted", *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 380 (1977), this Court has relaxed the standing requirements for facial challenges to ordinance which regulate First Amendment activity.

In order to bring a facial challenge to such an ordinance, a litigant need not establish that his/her own activity which is regulated by the challenged ordinance is protected. *Schaumburg* v. *Citizens For Better Environment,* 444 U.S. 620, 633-634 (1980); *Bigelow* v. *Virginia,* 421 U.S. 809, 815-817 (1975); *Grayned* v. *City of Rockford,* 408 U.S. 104, 114-121 (1972); *Gooding* v. *Wilson,* 405 U.S. 518, 520-522 (1972). Rather, because "facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court"—a plaintiff's ability to mount such a challenge "has nothing to do with whether or not its own First Amendment rights are at stake. The crucial issues are whether [the plaintiff] satisfies the requirement of 'injury-in-fact' and whether it can be expected satisfactorily to frame the issues in the case." *Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U.S. 947, 104 S. Ct. 2839, 2847 (1984). To make a showing of "injury-in-fact" for a facial overbreadth challenge, the

litigant need only prove that the challenged ordinance regulates its conduct and that the state has threatened to enforce the ordinance against it. *Id.* at 2846-48.

It is beyond dispute that the facts in the record before the court of appeals were not only clear and undisputed, but sufficient to satisfy these requirements. In its complaint, the Church pled that it operated in Clearwater, that it solicits from its members and that the City had expressly threatened to enforce the ordinance against it. See Complaint ¶¶ 7 and 83, pp. 6-7, *supra*. Not only were these facts clearly pled by the Church but at no time, either in its papers or in court, did the City contest them. Indeed, to the contrary, the City clearly agreed with these facts by stipulating[9] to the Church's standing at the hearing on the facial validity of Ordinance No. 3479-84.

Moreover, even if the City had not stipulated to these facts it would have been impossible for the City to successfully contest them. First the plain language of the ordinance clearly applies to the Church's activities. See sections 100.01 and 100.02 which define activities regulated by the ordiannce. Further, the City could not deny that

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[9] The Circuit's holding that the district court was not free to rely on this stipulation, (A38, A42-A43), is contrary to accepted practice throughout the courts of this country. *See, e.g., Bookins* v. *O'Bannon*, 699 F.2d 648, 652 n.9 (3d Cir. 1983); *United States* v. *Hernandez*, 668 F.2d 824, 826 (5th Cir. 1982); *Scheinberg* v. *Smith*, 659 F.2d 476 (5th Cir. 1981); *Marion Nat. Bank* v. *The Van Buren Bank*, 418 F.2d 121, 123 (7th Cir. 1969); *Meyers* v. *United States*, 386 F.2d 715, 716 (9th Cir. 1967); *Environmental Study and Protection* v. *Pac*, 464 F. Supp. 143 (D. Conn. 1978); *David* v. *Cahill*, 342 F. Supp. 463 (D.N.J. 1972); *Lamb Enterprises, Inc.* v. *Toledo*, 324 F. Supp. 134 *aff'd* 437 F.2d 59 (N.D. Ohio 1971); *Cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 209 (1972) (state stipulated to sincerity of respondents' religious beliefs).

Of course, there are situations in which such stipulations are ineffective, such as where parties stipulate to facts that are untrue or they stipulate to standing on the basis of a misapprehension of law. *See, e.g., Nyberg* v. *City of Virginia*, 361 F. Supp. 931 (D. Minn. 1973), *aff'd* 495 F.2d 1342, *appeal dismissed* 419 U.S. 891 (1974). However, neither of these situations exist here.

the Church is, or "holds itself out to be" a "charitable organization" as defined by Section 100.01(1). As noted above, not only did the City enact Ordinance No. 3479-84 for the exclusive purpose of regulating the solicitation activities of the Church, but it has consistently argued throughout this case that the ordinance applies to the Church. Accordingly, to contest these facts would be "logically untenable". *Larson* v. *Valente*, 456 U.S. 228, 240 (1982). (State argued in this Court that the Unification Church did not have standing because it was not a religion under the terms of the challenged ordinance, while at the same time having maintained that the provisions of the ordinance applicable only to religions applied to the Unification Church).

Despite this clear record establishing the Church's standing, the court of appeals held that it was impossible for the district court, and consequently for itself on appeal, to determine whether the Church had standing. In so holding, the court of appeals either seriously misconstrued the factual showing required to satisfy the standing requirements in the context of facial First Amendment challenges, or, understanding the required factual showing, it mysteriously required that these facts be shown by some method other than the verified allegations of the complaint and stipulations of the parties.

If the court of appeals' decision rested on the first alternative, as shown in the aforementioned discussion, it was simply wrong. If it rested on the second, it was similarly incorrect. In numerous First Amendment facial challenges decided by this Court, standing was satisfied merely by resort to the allegations in the complaint and the parties' stipulations. *See, e.g., Munson,* 467 U.S. 947, 104 S. Ct. at 2844, 2846, (factual showing that ordinance applied to plaintiff and that state threatened to so apply it, satisfied by allegations in the complaint and parties' stipulation); *Schaumburg,* 444 U.S. 620, (court decided facial validity

of ordinance on basis of allegations in complaint, additional factual material submitted found to be irrelevant).

The court of appeals' second but related justification for not reaching the merits of the Church's challenge is similarly incorrect. Apparently the court felt that, aside from the facts demonstrating standing, additional facts and evidence were needed to adjudicate the facial validity of the Clearwater Ordinance. Again, this holding betrays a fundamental misunderstanding of the nature of a facial challenge and the role of the federal courts in protecting First Amendment rights. The determination of whether an ordinance violates the First Amendment on its face is a *question of law*. Thus other than the facts required to prove standing, no additional factual material is necessary for resolution of this question. *Schaumburg*, 444 U.S. at 634.[10]

Finally, the court of appeals pointed to a "deeply rooted doctrine" that questions of constitutionality need not be reached unless strictly necessary as justification for its abstention. Again, this statement utterly ignores the nature of the instant challenge and the mandate of this Court. As deeply rooted as this doctrine may be, it has absolutely no bearing in the context of facial challenges brought under the First Amendment, especially where no substan-

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[10] The two circuit court cases cited by the court of appeals, *Nickert* v. *Puget Sound Tug & Barge Co.*, 480 F.2d 1039 (9th Cir. 1973) (*per curiam*); *Okolinsky* v. *Philadelphia, B. & N.E.R. Co.*, 282 F.2d 70 (3rd Cir. 1960), for the opposite proposition are not even arguably on point. Neither case involved a facial challenge brought under the First Amendment. In *Nickert* the Ninth Circuit held that the district court's ruling of *law* regarding defendant's liability for indemnity in a wrongful death action was not appealable under 28 U.S.C. § 1292(b) because it was decided without resolving the factual dispute regarding the issue of liability. In *Okolinsky*, the Third Circuit declined to review a ruling of the district court in an action tried under the Federal Employer's Liability Act and Safety Appliance Act, because the court failed to enter an order and because other issues remained to be tried.

tial questions existed as to the meaning of the municipal ordinance under state law. Indeed, the very purpose of a facial challenge is to be able to reach constitutional issues which otherwise might not be capable of adjudication until a later date. As this Court noted in *Munson,* "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." 104 S. Ct. at 2847. Accordingly, all of the justifications posited by the court of appeals for declining to rule on the merits of the Church's challenge are not only incorrect, they seriously undermine the doctrine developed by this Court to encourage and facilitate such challenges.

2. As a result of the court of appeals' improper refusal to adjudicate the fundamental constitutional questions raised by this case, the Church and its members, as well as all Clearwater citizens, have been subjected to the potential infringement of their First Amendment rights by Ordinance No. 3479-84 for over two years. Surely, this was precisely the result that the First Amendment overbreadth and standing doctrines were aimed at avoiding. At this point, the only way to remedy this situation is for this Court to adjudicate the facial validity of Ordinance No. 3479-84.

Ordinance No. 3479-84 violates the First Amendment in a number of equally pernicious ways. Foremost among the intrusions created by Ordinance No. 3479-84 is its regulation of the protected relationship between churches and their own members. Unlike all previous solicitation ordinances enacted by other government entities, Ordinance No. 3479-84 seeks to regulate solicitations by churches and voluntary associations of their own members. Indeed, it is likely that no other City or state has even attempted to regulate such "private" solicitations because analysis

of constitutional doctrine and case law compels the conclusion that such solicitations are entirely immune from government regulation.

This Court has repeatedly recognized the right of individuals to freely form religious and other voluntary associations. *NAACP* v. *Clairborne Hardware Co.*, 458 U.S. 886, 907-909, 932-933 (1982); *Larson* v. *Valente*, 456 U.S. 228, 244-246 (1982); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977). Once formed, the state is precluded from "probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in the country, regardless of the legislative purpose sought to be served. *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 565 (1963) (Douglas J. concurring); *see also, Roberts* v. *United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 3252 (1984) (government actions which "try to interfere with the internal organization or affairs of the group" unconstitutionally infringe on the freedom of association).

Clearly, the collection of information pertaining to, and investigation of, church-member solicitations would impermissably intrude upon internal affairs of churches and other voluntary associations. Churches rely on contributions from their members to survive, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943), and thus the contribution process itself is frequently built into religious doctrine and practice. Any attempt by the government to investigate or gather information on solicitations made by members to their churches would therefore necessarily require the state to become enmeshed in numerous intricate religious practices and doctrines, in violation of both the Free Exercise and Establishment Clauses. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Moreover, the provisions of the ordinance which require churches to turn over extensive information about their

internal operating procedures and affairs to any member who asks for this information, section 100.02(3), (J18-J20), and to adopt particular refund policies, section 100.05(1) (f) and (g), (J41-J42), similarly violate the Establishment Clause in two respects.

First, as a matter of church doctrine, many churches which are hierarchally organized do not permit members to know such matters as the salaries of church officials, the aggregate assets of the organization, or the nature and purpose of all church expenditures. Thus, section 100.02(3), (*Id.*), mandates that these churches adopt a particular form of church governance contrary to that which they have selected. The refund provisions similarly attempt to dictate church governance and policy. Both of these provisions therefore, violate the Establishment Clause by requiring the state to become involved in and dictate "matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 813 (1976).

Further, if a dissatisfied church member feels that the church has not complied with the disclosure or refund provisions, he can invoke the power of the state to compel church leaders to govern their churches in accordance with the standards established by the City of Clearwater. For over a century, the courts of this country have held that the state may not intervene to vindicate supposed rights of members or ex-members of a church who claim they were improperly excommunicated, disciplined or induced to join or donate money. *Watson* v. *Jones,* 13 Wall (80 U.S.) 666 (1872); *see also, Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church,* 344 U.S. 94 (1952), recognizing that the *Watson* principal is constitutionally mandated. Indeed, the Framers of the Constitution were well aware that the imposition of state power and authority on the side of various religious factions had caused

centuries of religious wars in Europe, and it was this perilous linkage which they sought to prohibit by the First Amendment. *See Everson* v. *Board of Education,* 330 U.S. 1 (1947). Thus, Ordinance No. 3479-84 creates an unprecedented intrusion into the private and constitutionally protected association of churches and their members.

Even if Ordinance No. 3479-84 did not regulate and intrude on the relationship between members and their churches, it would nevertheless violate both the Free Exercise and Establishment Clauses of the First Amendment. As this Court has frequently recognized, public solicitation by religious or other groups is highly protected activity under the First Amendment, both because it is often an effective method of reaching an audience or of proselytizing and because fundraising is necessary in a practical sense for a church or association to survive. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Schaumburg* v. *Citizens for Better Environment,* 444 U.S. 620 (1980).

The Clearwater Ordinance conditions the exercise of this protected right on the submission to a massive regulatory scheme, which requires churches not only to gather and disclose enormous amounts of information, section 100.03(1)(a)-(o), (J20-J28), but to maintain records and documents supporting the disclosure required. Moreover, by means of these provisions as well as the provisions granting the city attorney broad investigatory powers, section 100.06, (J44-J48), the ordinance subjects churches to comprehensive and ongoing government scrutiny of their budgets and disbursements. Such massive record keeping requirements not only unduly burden church's resources so as to inhibit the free exercise of religion, but the mere information gathering by the government creates excessive entanglement between church and state. *Catholic Bishop,* 440 U.S. at 502; *see also Surinach* v. *Pesquera de*

Busquets, 604 F.2d 73, 89 (1st Cir. 1979), (compelled disclosure of costs and disbursements of Catholic School has potential to chill decision making process of church because of the threat that its decision will become the subject of public hearings and if found wanting will be supplanted by governmental control).

As is evident from the foregoing discussion, the Clearwater Ordinance not only offends the religion clauses of the First Amendment, but, because it regulates a substantial amount of protected expression, it is also impermissably overbroad. *See, e.g., Schaumburg* v. *Citizens for Better Environment,* 444 U.S. 620 (1980); *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

As discussed above, the right of churches to peacefully solicit from their own members on their own premises is absolutely protected under the First Amendment, as is their right to determine matters of religious doctrine and policy. In the guise of regulating fraud in solicitations, however, the Clearwater Ordinance irreparably curtails and inhibits these rights.

Although the state may impose narrow and precise regulations to prevent fraudulent solicitations, *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), by virtue of the fact that the Clearwater Ordinance affects the aforementioned substantial and protected activities it is clear that the ordinance in no way satisfies this requirement.

The state may only legitimately regulate fraud or other abuses when "activities begin to affect or collide with liberties of others or of the public." *Prince* v. *Massachusetts,* 321 U.S. 158, 177 (1944) (Jackson J. concurring and dissenting on other grounds); *see Founding Church of Scientology* v. *United States,* 409 F.2d 1146, 1156 n. 32 (D.C.

1969) *cert. den.* 396 U.S. 963 (1969); *Estate of Supple,* 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966) *cert. den.* 389 U.S. 820 (1967); L. Tribe, *American Constitutional Law* ¶¶ 14-12 pp. 865-880. Thus, although the state may therefore enact regulations aimed at preventing imposters from soliciting for religious causes and at ensuring that money solicited for specific charitable causes is given to those causes, it may not, as attempted by the City of Clearwater, seek simply to oversee and dictate the internal functioning of a church and to pass judgment on how money solicited for general church purposes is spent by the church. That the Clearwater Ordinance is aimed primarily at these protected activities is evident from the face of the statute itself. Indeed, most of the record keeping requirements seek information about the internal affairs of organizations, rather than about the identity of the solicitors or about whether money solicited for specific and identified purposes is used for these purposes. Thus, the Clearwater Ordinance clearly extends and intrudes the state's authority far beyond the outer reaches of permissible First Amendment boundaries.

Finally, the Clearwater Ordinance runs afoul of the First Amendment because it is overly vague and thus delegates authority without meaningful limitations, thereby giving government officials the power to enforce the provisions of the ordinance in an arbitrary and discriminatory fashion. *Kolender* v. *Lawson,* 461 U.S. 352 (1983); *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972). For instance, the Clearwater Ordinance provides no standards by which the City Clerk is to determine the sufficiency of a registration statement and thus to grant or deny a permit. Section 100.03(2). (J28). Indeed, section 100.03(3), (J29), indicates that the City Clerk is empowered to grant or deny a permit "for any reason." Further, the City Attorney's power to investigate and prosecute violations of the ordinance are similarly ill-defined. Section 100.05(1)(b), (J40),

allows the City Attorney to determine the truthfulness and/or sufficiency of a registration statement and to prosecute churches if he finds that their statements are untruthful or insufficient. However, the ordinance provides no standards for how the City Attorney is to make these determinations. Similarly, although the City Attorney is authorized to initiate an investigation of an organization if ten "bona fide" complaints are filed against it, the ordinance provides no instruction as to what constitutes a "bona fide" complaint. Section 100.06 (1). (J45). Thus, the Clearwater Ordinance clearly vests local officials with the power to make *ad hoc* decisions in an arbitrary and discriminatory fashion in violation of the First Amendment.

Unless this Court grants *certiorari* to review the substantial and weighty issues of law regarding facial challenges under the First Amendment presented by the instant petition and, to review the merits of the Church's facial challenge, the Church will not only be forced to relitigate issues of fact and law regarding its standing, which were correctly decided by the district court, but a facially unconstitutional ordinance will remain in effect, inhibiting and chilling First Amendment rights of many people, not just members of the Church of Scientology. As this Court has more than once recognized, if this ordinance is allowed to remain unchallenged, society will be the loser.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March, 1986

85-1553 (2)

No. 85-

FILED
MAR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Petitioner,

—against—

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, and LUCILLE WILLIAMS, City Clerk of the City of Clearwater,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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March 1986

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APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3232

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.,

Plaintiff-Appellee,

- against -

CITY OF CLEARWATER, ET AL.,

Defendants-Appellants.

No. 84-3236

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, ET AL.,

Plaintiffs-Appellees,

- against -

CITY OF CLEARWATER, FLORIDA ETC., ET AL.,

Defendants-Appellants.

**Nos. 84-3543, 84-3544,
84-3545, 84-3546,
85-3574**

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.,

Plaintiff-Appellant,

- against -

CITY OF CLEARWATER, ET AL.,

Defendants-Appellees.

No. 84-3575

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ET AL.,

Plaintiffs-Appellants,

- against -

CITY OF CLEARWATER, FLORIDA, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

(November 13, 1985)

Before TJOFLAT and KRAVITCH, Circuit Judges, and DUMBAULD*, District Judge.

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* Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

TJOFLAT, Circuit Judge:

These consolidated appeals involve challenges brought by two separate plaintiff groups to the constitutionality of a repealed City of Clearwater, Florida ordinance and its successor ordinance, both of which regulated charitable solicitation.1/ The district court

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1/ The plaintiffs' challenges were brought pursuant to 42 U.S.C. § 1983 (1982), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(footnote continued)

declared the first ordinance unconstitutional and permanently enjoined its enforcement. The district court declared the second ordinance facially constitutional and certified the issue to this court for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982).

We vacate the district court's first decision for want of a case or controversy. We decline to pass on its second decision because leave to appeal pursuant to section 1292(b) was improvidently granted.

(footnote continued from previous page)

The district court's jurisdiction over these claims was conferred by 28 U.S.C. § 1331 (1982) and 28 U.S.C. § 1343(a)(3) (1982).

I.

A.

On October 6, 1983, the City of Clearwater enacted Ordinance No. 3091-83 which sought to regulate charitable solicitations. The ordinance required charitable organizations that wished to solicit funds in Clearwater to register with the City, maintain certain records, disclose the sources and uses of their contributions, refrain from engaging in fraudulent solicitation practices, and submit to an investigation by the City Attorney on the complaint of ten or more individuals. The operative provisions of the ordinance were to become effective on January 31, 1984.

Americans United for Separation of Church and State and several other named plaintiffs (collectively "Americans United") brought a ten-count action in the district court on January 20, 1984 to enjoin the City and its officers from enforcing the ordinance. Each count raised a discrete constitutional claim.[2/] On January 23, the Church of Scientology Flag Service Organization, Inc. ("Church of Scientology") brought a separate twelve-count action for injunctive relief on grounds similar to those raised by

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2/ Americans United alleged that the ordinance violated the due process and equal protection clauses of the fourteenth amendment; the free speech, free press, free exercise and establishment of religion clauses of the first amendment; the commerce clause; and the right to privacy guaranteed by the first, fourth, fifth, and ninth amendments.

Americans United.[3] Both plaintiffs moved the court for a temporary restraining order pursuant to Fed. R. Civ. P. 65(b); such an order became unnecessary, however, when the City agreed not to enforce the ordinance pending a final determination on the merits.

The court scheduled a final hearing on the plaintiff's prayers for a permanent injunction[4] on March 9, 1984. At the hearing, the parties requested the court to limit the scope of the hearing

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[3] The district court took no formal action on the City's motion to consolidate the two cases. It therefore entered duplicate orders whenever an issue arose common to both cases.

[4] The plaintiffs prayed for preliminary and permanent injunctive relief. Fed. R. Civ. P. 65(a)(2) authorized the court to consolidate their application for a preliminary injunction with the trial of the action on the merits.

to the facial validity of the ordinance and defer to a subsequent hearing its decision on the plaintiffs' claims that the ordinance was unconstitutional as applied. The court granted the parties' request and confined the hearing to the facial constitutionality of the ordinance. The parties presented no evidence save a brief stipulation between the Church of Scientology and the City. They stipulated to the existence of the ordinance, that the City was a municipality of the state, that the Church of Scientology was a Florida corporation, and that it sells books and pamphlets and pays some Scientologists commissions on funds they solicit. These parties also stipulated that the court had subject matter jurisdiction over their case and

that venue was proper. Finally, the City advised the court that it would not challenge the Church of Scientology's standing to bring the suit, except as to those claims alleging that the ordinance violated the freedom of religion clauses of the first amendment.

Americans United and the City stipulated to nothing. On the standing issue, the City maintained an inconsistent position. The City advised the court that it would not contest any of the Americans United plaintiffs' standing to sue; at the same time, the City said it reserved the right to challenge the standing of any of such plaintiffs to prosecute any of their claims. The court did not resolve this inconsistency.

After entertaining argument from counsel on the facial validity of the ordinance, the court directed counsel to file post-hearing memorandums by March 16. On March 15, the City Commission enacted an emergency ordinance, No. 3479-84, as an amendment to Ordinance No. 3091-83. The amended ordinance consisted of a comprehensive scheme to regulate charitable solicitation, making substantial modifications to Ordinance No. 3091-83. It provided for the repeal of any conflicting ordinance, thereby effectively repealing Ordinance No. 3091-83. As an emergency ordinance, it would have automatically expired at the

end of ninety days, if not passed as a non-emergency ordinance within that time.5/

The City promptly notified the district court and the plaintiffs' counsel of the amended ordinance. Rather than allowing the plaintiffs to amend their complaints and adjudicate the validity of the new ordinance, the district court, on March 28, proceeded to determine the facial validity of repealed Ordinance No. 3091-83. Without specifying which of the several counts of the plaintiffs' complaints it was deciding, the court declared the repealed ordinance unconstitutional and permanently enjoined

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5/ The emergency ordinance explicitly provided for its expiration in 90 days. The Clearwater City Charter also mandated a 90-day expiration period for emergency ordinances.

its application and enforcement. The court held that the ordinance was overly burdensome of first amendment rights, given the legitimate state interest involved, and was also impermissibly vague and discriminatory.

The court justified its jurisdiction to adjudicate the validity of the repealed ordinance on two grounds. First, a finding of no jurisdiction would encourage cities to enact laws affecting the constitutional rights of its citizens and, if challenged in court, simply amend such laws, thereby prolonging the period of uncertainty as to citizens' rights. Second, the court, noting the large number of cases pending on its docket, stated that it could not permit the litigants to delay the completion of

their cases by amending their pleadings at the eleventh-hour and thereby occupy "someone else's day" in court. Accordingly, an immediate decision terminating the instant cases was mandated. The court terminated the Americans United case by granting the injunctive relief sought and "dismissing" the case.6/ The

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6/ As we indicate in the text supra, Americans United's complaint contained 10 counts. The district court's dispositive order, however, did not indicate the count or counts on which the court granted relief. We do know that the court did not adjudicate the counts alleging that the ordinance was unconstitutional as applied. As to these counts, the dispositive order dismissing the case is open to two interpretations: the court either dismissed them with prejudice, i.e., on the merits, or without prejudice, meaning that the plaintiffs could refile their suit if the district court's order was reversed on appeal. The problem such an order presents a litigant occupying Americans United's position is that it must cross appeal from the district court's disposition of the dismissed counts. If
(footnote continued)

court similarly terminated the Church of Scientology case, granting the relief sought and dismissing eleven of the twelve counts of the plaintiff's complaint.7/ The court's dispositive order failed to dispose of the twelfth count, however. Consequently, the court retained jurisdiction of that much of the Church of Scientology case.

(footnote continued from previous page) not, it runs the risk that a subsequent court could read the district court's dispositive order as dismissing the presumably "unadjudicated" counts on the merits, thus barring the plaintiff from litigating such counts. This problem will not arise in this instance, however, because we vacate the district court's order and direct the dismissal of the case without prejudice.

7/ The court did not indicate whether these counts were being dismissed with or without prejudice, thus raising the problem we discuss supra note 6.

The City appealed the court's injunctive orders. We assume jurisdiction of these appeals pursuant to 28 U.S.C. § 1292(a)(1)(1982).[8]

B.

On April 20, 1984, the Church of Scientology, seeking to enjoin the emergency ordinance, No. 3479-84, moved the district court for leave to amend the remaining count of its complaint. Its proposed amendment presented the same constitutional challenges that had been addressed to the original ordinance. At the same time, the Church of Scientology moved the court to issue a temporary

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[8] 28 U.S.C. § 1292(a)(1) (1982) provides that the courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts granting or refusing to grant injunctions. These appeals are Nos. 84-3232 (Church of Scientology) and 84-3236 (Americans United).

restraining order prohibiting the City from enforcing Ordinance No. 3479-84. A hearing on these motions commenced one hour after they were filed. The Church of Scientology appeared, but the City did not. The court granted both motions and set April 27 as the date it would hear the plaintiff's application for a preliminary injunction. The hearing was continued, and the parties stipulated to an extension of the temporary restraining order pending resolution of such application.

The City of Clearwater enacted Ordinance No. 3479-84 as a permanent ordinance on May 17, 1984. On May 21, Americans United instituted a new action in the district court seeking injunctive relief and challenging the constitution-

ality of Ordinance No. 3479-84 on the grounds raised in its previous suit. Simultaneously, Americans United moved for a temporary restraining order, which the court granted. On May 24, the Church of Scientology also filed a new suit, seeking the same relief as Americans United on essentially the same grounds. At this point, the Church of Scientology had two identical suits pending, the newly filed suit and the previous case whose complaint had been amended.9/ On May 30, the court set July 13 as the date for a final hearing on both plaintiffs' applications for injunctive relief.10/

9/ The two Church of Scientology cases and the Americans United case challenging the new ordinance were not consolidated by the district court. See supra note 3.

10/ The court consolidated plaintiffs' application for preliminary injunctive (footnote continued)

Shortly thereafter, the City moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the plaintiffs' complaints for failure to state a claim for relief, and Americans United moved the courts for summary judgment. On June 19, the court issued an order informing the parties that it would limit the scope of the final hearing to the question of the facial constitutionality of the new ordinance.11/

(footnote continued from previous page) relief with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). See supra note 4.

11/ Because the July 13 hearing was limited to the facial constitutionality of the ordinance, the court must not have intended the hearing to be the sort of final hearing apparently contemplated by its May 30 order. See supra note 10.

The final hearing was held, as scheduled, on July 13, 1984. When the hearing began, the court announced that it would not consider the merits of any of the pending motions or receive any evidence. Rather, the court would only address the facial constitutionality of the ordinance in the abstract. During the hearing it became apparent that the court was concerned with one other issue, the plaintiffs' standing to challenge the ordinance. When the City's Attorney stated, in response to the court's inquiry as to his position, that the City was not contesting the plaintiffs' standing at that time, the court proceeded to the merits of their claims that the ordinance was unconstitutional on its face.

After hearing the argument of counsel, the court stated that, in its view, each and every section of the amended ordinance was facially constitutional, and, on July 23, the court entered written orders to that effect in the two Church of Scientology cases and the Americans United case. The orders stated, in addition, that the facial constitutionality of the ordinance constituted a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982)[12/] may materially

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12/ 28 U.S.C. § 1292(b) (1982) provides that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a
(footnote continued)

advance the ultimate termination of the litigation. An administrative panel of this court subsequently granted the plaintiffs leave to appeal from these interlocutory orders.13/

(footnote continued from previous page) controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

13/ These appeals are Nos. 84-3574 (Church of Scientology) and 84-3575 (Americans United).

At the July 13 hearing, the district court indicated that, although the new ordinance was facially valid, it would enjoin the City from enforcing the ordinance pending our disposition of any section 1292(b) appeals that may be taken. The City objected, contending that the court's decision upholding the ordinance rendered an injunction inappropriate and that, at the very least, the City should be able to enforce the ordinance's less burdensome provisions. On July 23, the court, after issuing the orders declaring the ordinance valid, issued a second set of orders converting the still extant temporary restraining orders to preliminary injunctions prohibiting the City from enforcing the portions of the ordinance that dealt with

a charitable organization's obligation to register with the City and to maintain certain records. The court gave no reasons for this action.

The City did not appeal from this preliminary injunction. The Church of Scientology has appealed, however, contending that the court erred in declaring the ordinance constitutional and that it should have enjoined the enforcement of the ordinance in its entirety.14/

C.

On July 31, 1984, the Church of Scientology, in an effort to get the district court to rule on its claims that the new ordinance was unconstitutional as

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14/ Jurisdiction over these appeals (No. 84-3543 and 84-3545) is conferred by 28 U.S.C. § 1292(a)(1) (1982). See supra note 8.

applied, moved the district court, in both of its cases, for a temporary restraining order prohibiting the City from enforcing the ordinance and requested the court to schedule an evidentiary hearing on its undisposed application for a preliminary injunction. A hearing on the motion for a temporary restraining order was held two days later. The Church of Scientology and the City appeared and presented argument. At the conclusion of the hearing, the court announced from the bench that it would deny the motion and would not give the Church of Scientology a hearing on its application for a preliminary injunction. Later in the day, the court issued written orders denying the plaintiff's motion for a temporary restraining order

and its application for a preliminary injunction. The Church of Scientology appeals from these orders.15/

After the parties' perfected their respective appeals, the Church of Scientology moved this court for an injunction prohibiting the City from enforcing Ordinance No. 3479-84 pending our disposition of such appeals. See Fed. R. App. P. 8. An administrative panel of this court granted the motion without opinion.

In deciding the parties' appeals, we first dispose of the district court's orders prohibiting the City from enforcing the repealed ordinance, No. 3091-83. We vacate those injunctive orders principally because the

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15/ Jurisdiction over these appeals (Nos. 85-3544 and 84-3546) is conferred by 28 U.S.C. § 1292(a)(1) (1982). See supra note 8.

controversy they adjudicated was, and is, moot. Second, we dismiss the section 1292(b) appeals from the district court's determination that the new ordinance, No. 3479-84, is facially constitutional because leave to prosecute these appeals was improvidently granted. Third, we affirm the district court's refusal to grant the Church of Scientology's applications for a preliminary injunction because the Church failed to establish the criteria necessary for the granting of preliminary injunctive relief.

II.

A.

The City of Clearwater has appealed from the district court's order in both the Americans United and the Church of Scientology cases declaring repealed

Ordinance No. 3091-83 unconstitutional and permanently enjoining its enforcement. Because we conclude that the issue of the ordinance's validity was moot at the time it was decided, we vacate the district court's orders enjoining the ordinance's enforcement and remand the two cases with instructions that they be dismissed without prejudice.16/

The Constitution limits the exercise of the judicial power to cases and controversies. U.S. Const. art. III, § 2. An action that has become moot or academic does not present a justiciable controversy within the case or controversy clause. See Aetna Life Insurance

16/ Because we do not decide these appeals on the merits, it follows that our direction to the district court must be to dismiss the cases without prejudice.

Co. v. Haworth, 300 U.S. 227, 239-40, 57 S. Ct. 461, 463-64 (1937). The case must consist of a present, live controversy in order to "avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48, 90 S. Ct. 200, 201-02 (1969) (per curiam).

In addition to the constitutional limits on jurisdiction, the Supreme Court has established a long-standing policy of refusing to decide constitutional issues unless strictly necessary. Rescue Army v. Municipal Court, 331 U.S. 549, 568-72, 67 S. Ct. 1409, 1419-21 (1947). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality...unless such adjudication

is unavoidable." Spector Motor Service v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944). This rule is basic to the federal system and the judicial function within that structure. Rescue Army v. Municipal Court, 331 U.S. at 570-71, 67 S. Ct. at 1420-21.17/ Ordinance No. 3091-83 was no longer in force when the district court declared it unconstitutional.18/ "Where by...a

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17/ The rule is a corollary of the case and controversy requirement and works to achieve the same purpose. Rescue Army v. Municipal Court, 331 U.S. at 570-71, 67 S. Ct. at 1420-21. The line between the two is often very thin. Id.; see also 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.1, at 224-26 (2d ed. 1984).

18/ The Church of Scientology argues in its brief that Ordinance No. 3479-84 would have expired by its own terms in 90 days if not reenacted and that the old ordinance would then be revived. Brief for Appellee at 9-10, 21 n.13. No citation is given to support this
(footnote continued)

subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." United States v. Alaska S.S. Co., 253 U.S. 113, 116, 40 S. Ct. 448, 449 (1920).19/

(footnote continued from previous page) assertion, nor did the district court discuss this issue of state law. We note, however, that Ordinance No. 3479-84 provided for the repeal of inconsistent ordinances and made no provision for bringing the prior ordinance back to life. There is some doubt whether the City of Clearwater would have the power under state law or its charter to enact such a measure.

19/ See Hearn v. Hudson, 549 F. Supp. 949 (W.D. Va. 1982) (repeal of challenged ordinance rendered moot a prayer for declaration of unconstitutionality); 6A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 57.13, at 57-127 (2d ed. 1984) ("statute passed during the course of litigation may make unnecessary a determination of the former controversy").

An actual controversy must exist at all stages of review. Preiser v. Newkirk, (footnote continued)

The district court justified its adjudication of the repealed ordinance on two grounds. First, the court had to decide the question; otherwise, the City could enact laws affecting the plaintiffs' constitutional rights and avoid an adjudication of the validity of those laws by amending them prior to a decision. In an appropriate case this concern might justify reaching a decision on the validity of an ordinance no longer

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(footnote continued from previous page) 422 U.S. 395, 401, 95 S. Ct. 2330, 2334 (1975). It is clear that the controversy over Ordinance No. 3091-83 retains no vitality at this stage of review. Ordinance No. 3479-84 has been permanently enacted and is the subject of vigorous litigation between the same parties. Accordingly, it would now be appropriate to vacate the judgments below with directions to dismiss the cases even if some controversy had existed at the time of the district court decision. See United States v. Munsingwear, Inc., 340 U.S. 36, 39-40, 71 S. Ct. 104, 106-07 (1950).

in force.20/ However, in this instance there was no indication that the City was acting in a manipulative fashion in order to prevent an adjudication or that any reasonable likelihood existed that Ordinance No. 3091-83 would regain vitality.21/ The proper course of action

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20/ See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S. Ct. 1070 (1982), where the City of Mesquite repealed the complained of portion of an ordinance after a district court declared it unconstitutional, but the appeal was not rendered moot because the City had announced an intention to reenact the objectionable language if the judgment were vacated. Id. at 289 & n.11, 102 S. Ct. at 1074-75 & n.11.

21/ The fact that the ordinance was repealed and a new one enacted indicates that the City wished to regulate the subject matter in question, but believed there were problems with the original ordinance. Under these circumstances, it does not appear that any likelihood existed of a return to the original ordinance.

Ample measures exist that would prevent a
(footnote continued)

would have been to allow the plaintiffs to amend their complaints and proceed to litigate the ordinance then in effect.[22]

(footnote continued from previous page) city from using last-minute amendments to avoid a determination on the constitutionality of its ordinances. For example, the rule that voluntary cessation of challenged conduct will not moot a controversy if there is a reasonable expectation that the alleged violation will recur might be applicable. See County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979). Review might also be available under the "capable of repetition yet evading review" exception to the mootness doctrine. This doctrine has two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975) (per curiam). The "capable of repetition" exception is not applicable to the present situation because there is little likelihood that review will be evaded. The City has enacted Ordinance No. 3479-84, regulating conduct similar to that regulated by the former ordinance, and the new ordinance is subject to review.

The court's second ground for deciding the validity of the repealed ordinance requires no discussion and no citation of authority. The fact that the court was laboring under a heavy docket and desired to bring these cases to a quick conclusion simply did not, and could not, justify the resolution of a constitutional question in the absence of a live controversy.

22/ There are numerous cases illustrating the principle that where a challenged ordinance is amended during litigation the appropriate course is to proceed to a consideration of the amended ordinance. See, e.g., International Soc'y for Krishna Consciousness v. City of Houston, 689 F.2d 541, 543 (5th Cir. Unit A 1982); Milwaukee Mobilization for Survival v. Milwaukee County Park Comm'n, 477 F. Supp. 1210, 1215 (E.D. Wis. 1979).

B.

In addition to presenting no live controversy over Ordinance No. 3091-83, the record contains no facts to support the district court's implied finding that the plaintiffs had standing to challenge the constitutionality of the ordinance. A threshold question in every federal case is whether the plaintiff has made out a justiciable case or controversy within the meaning of article III. See Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975). This requires that the minimum constitutional standing requirements be demonstrated: actual or threatened injury, fairly traceable to the challanged action, and redressable by a favorable decision. Valley Forge Christian College v. Americans United for

Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982).

The district court received no evidence, except a brief stipulation between the Church of Scientology and the City, prior to entering its injunctive orders. It merely entertained counsel's arguments on the legal question of the ordinance's facial constitutionality. Contrary to Fed. R. Civ. P. 52(a), the only facts the court recited in its orders were the enactment of the ordinance and the municipal status of the City.23/ These facts and those contained

23/ Fed. R. Civ. P. 52(a) requires the court to "find the facts specially and state separately its conclusions of law" in all actions tried without a jury. The only facts noted in the district court's memorandum opinion and orders were that the City, a municipality of the State of (footnote continued)

in the stipulation between the Church of Scientology and the City, as detailed in Part I.A., supra, did not provide an adequate basis to justify a finding of standing. There was no indication that the Church of Scientology operated in Clearwater and would be affected or injured by the ordinance.

It is true that the City informed the court that, except for the Church of Scientology's first amendment freedom of religion claims, it would not challenge the standing of the Church of Scientology to bring the action. A plaintiff does not acquire standing merely because the

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(footnote continued from previous page) Florida, enacted the ordinance in question, the plaintiffs challenged the ordinance, the City agreed not to enforce the ordinance pending the litigation, and the ordinance was subsequently amended. These facts had little, if any, bearing on the plaintiffs' standing to sue.

defendant raises no objection. Standing is a matter of the case-or-controversy requirement of article III, and a district court is obliged to ensure that this jurisdictional requirement is satisfied. Juidice v. Vail, 430 U.S. 327, 331, 91 S. Ct. 1211, 1215 (1977). In short, the district court was not free to rely on the City's concession on standing. Further, the City's concession excluded claims based on the freedom of religion clauses of the first amendment, which were the heart of the Church of Scientology's challenge to the ordinance and provided the basis for the district court's conclusion that the ordinance was unconstitutional.

Americans United and the City made no stipulation. The City did advise the court that it would not question the Americans United plaintiffs' standing, but in the same breath it insisted on reserving the right to challenge the standing of any of such plaintiffs to prosecute any of their claims. This inconsistent statement, which went unresolved, accomplished nothing. As to the plaintiffs in each of the cases before it, the court was obligated to determine that they had adequate standing to present their constitutional challenges. Bald assertions, or concessions, of counsel could not suffice. Standing is a mixed question of fact and law.[24] To the extent that it is a

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[24] Because standing is jurisdictional, (footnote continued)

question of fact, the court must find the facts and recite them in a fashion that will accommodate appellate review. See Fed. R. Civ. P. 52(a).

III.

Americans United and the Church of Scientology were granted leave to appeal, pursuant to 28 U.S.C. § 1292(b) (1982),25/ the interlocutory orders of the district court declaring Ordinance No. 3479-84 facially constitutional. We have concluded that their motions for leave to appeal these interlocutory

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(footnote continued from previous page) a reviewing court must satisfy itself that the constitutional requirements are satisfied. Secretary of State v. Joseph H. Munson, Co., ___ U.S. ___, 104 S. Ct. 2839, 2846 n.4 (1984). This is a legal determination based on the facts established by the record.

25/ See supra note 12.

orders were improvidently granted and vacate the orders allowing the appeals to proceed.

The district court, at its July 13 hearing on the facial validity of the new ordinance, expressly declined to consider Americans United's motion for summary judgment and the City's motions to dismiss each of the cases for failure to state a claim. Instead, the court ruled on the constitutionality of the ordinance in the abstract without any factual or evidentiary foundation. We have determined that the question of the constitutionality of the ordinance is not ripe for appellate review for several reasons.

There is no evidence in the record informing us whether the parties had standing to bring their constitutional

challenges. As stated in Part II.B., supra, it is not possible to determine whether any of the plaintiffs had standing to challenge the original ordinance. The problem became exacerbated when the plaintiffs attacked the new ordinance. Two new suits were instituted, and the Church of Scientology's original complaint was amended, but no factual findings have been made to support the new claims. The transcript of the July 13 hearing merely indicates that the City would not contest the plaintiffs' standing at that time. As we have stated, supra, the court had a constitutional obligation to ensure that the jurisdic-

tional standing requirements were met. See Juidice v. Vail, 430 U.S. at 331, 97 S. Ct. at 1215.26/

The statute permitting discretionary interlocutory review requires that the district judge have issued "an order not otherwise appealable." 28 U.S.C. § 1292(b) (1982) (emphasis added).27/

26/ We do not intimate any view on whether the plaintiffs can establish standing to sue. We merely note that it is impossible to make the determination on the basis of the record before us.

27/ 28 U.S.C. § 1292(b) also requires us to assess whether "an immediate appeal...may materially advance the ultimate termination of the litigation." We have considerable doubt whether an appeal in this instance satisfies this standard. The plaintiffs have sought preliminary injunctive relief alleging that the ordinance is facially unconstitutional and unconstitutional as applied. They are entitled to prompt consideration of their motions for preliminary relief. The district court has closed these cases pending the plaintiffs' appeal of its interlocutory orders, depriving the
(footnote continued)

Although the district court's decision on the facial constitutionality of Ordinance No. 3479-84 was denominated an order, we conclude that it was not an order within the meaning of the statute. The ruling was a mere expression of the district court's view of the law unassociated with the disposition of any claim. See Nickert v. Puget Sound Tug & Barge Co., 480 F.2d 1039, 1041 (9th Cir. 1973) (per curiam); Okolinsky v. Philadelphia, Bethlehem & New England Railroad, 282 F.2d 70, 71 (3d Cir. 1960). The court

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(footnote continued from previous page) plaintiffs of the opportunity to put forth evidence and establish their right to preliminary relief. The "ultimate termination" of this litigation would have best been accomplished by proceeding to a determination of the motions for a preliminary injunction. Appellate review of the grant or denial of the injunction would then have been appropriate. See supra note 8.

answered a hypothetical, abstract question of law. Its ruling had no concrete effect.

An appellate ruling on the facial validity of the new ordinance would be purely advisory. Aside from the constitutional prohibition against the rendering of advisory opinions, it would be unwise for us to establish part of the law of the case at this time. Such a decision could present difficulties for the district court and the parties beyond our ability to forsee as the case proceeds to a determination on the merits. See Nickert v. Puget Sound Tug & Barge Co., 480 F.2d at 1041; Molybdenum Corp. v. Kasey, 279 F.2d 216, 217 (9th Cir. 1960) (per curiam). What we have said deserves special emphasis where a

constitutional question is at issue. The deeply rooted doctrine that questions of constitutionality not be reached unless strictly necessary, see Rescue Army v. Municipal Court, 331 U.S. at 568-72, 67 S. Ct. at 1419-21, is particularly appropriate in this instance where no evidentiary or factual background is presented, no claims have been disposed of, and a purely hypothetical question is involved.

IV.

The Church of Scientology has appealed from the orders the district court entered following its facial constitutionality ruling which enjoined the enforcement of portions of Ordinance No. 3479-84 but declined to enjoin the ordinance in its entirety. The Church of

Scientology has also appealed from the district court's denial of a preliminary injunction on its claim that the ordinance was unconstitutional as applied. We affirm the district court's denial of the applications for preliminary injunctive relief.

The elements a plaintiff must satisfy to obtain a preliminary injunction are firmly established. The plaintiff must show that: (1) there is a substantial likelihood that it will prevail on the merits at trial; (2) it will suffer irreparable harm if injunctive relief is not granted; (3) the benefits of the injunction will outweigh the harm it will cause the defendant; and (4) the issuance of the injunction will not harm public interests. Callaway v. Block, 763

F.2d 1283, 1287 (11th Cir. 1985). A district court's order denying a preliminary injunction will not be reversed absent an abuse of discretion. Id.

The record is devoid of any evidence indicating that this plaintiff established a right to an injunction.28/ It presented no evidence and established none of the criteria. The Church of Scientology would have us hold that it was entitled to preliminary injunctive relief as a matter of law solely on the basis of its naked allegations.29/ This of course we cannot do.

28/ No findings of fact or conclusions of law accompanied the district court's orders denying preliminary injunctive relief.

29/ The Church of Scientology has not complained of the district court's refusal to schedule a hearing on its application for a preliminary injunction. We therefore need not address the issue.

V.

Several consolidated appeals are presented in this case. Because we have determined that the controversy over Ordinance No. 3091-83 was moot when decided, we order, in Nos. 84-3232 and 84-3236, that the injunctions be VACATED and the cases dismissed without prejudice. We have found that leave to appeal the interlocutory orders in Nos. 84-3574 and 84-3575 was improvidently granted. We accordingly VACATE the orders granting such leave. We AFFIRM the district court's denial of the Church of Scientology's motions for a preliminary injunction in Nos. 84-3543, 84-3544, 84-3545, and 84-3546.

APPENDIX B

Opinion and Order of United States District Court for the Middle District of Florida on Application for A Preliminary Injunction Enjoining Enforcement of Ordinance No. 3091-83

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.

Plaintiff(s),

vs. CASE NO. 84-96-CIV-T-17

CITY OF CLEARWATER, et. al.,

Defendant(s).

and

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, et. al.,

Plaintiff(s),

CASE NO. 84-97-CIV-T-17

vs.

CITY OF CLEARWATER, FLORIDA,
et. al.,

Defendant(s). /

MEMORANDUM OPINION AND ORDER

This cause is before the Court on complaints seeking declaratory and injunctive relief challenging the enforcement of Clearwater Ordinance

Number 3091-83 (see Appendix 1), enacted by the Clearwater City Commission on October 6, 1983.

The City of Clearwater is a municipality of the State of Florida. Ordinance 3091-83 was passed on October 6, 1983, and did not go into force until January 31, 1984. On January 27, 1984, the parties entered into a stipulation by which they agreed the ordinance would not be enforced during the pendency of the instant litigation.

One should always be careful when attempting to summarize an ordinance or statute. In brief, the Clearwater ordinance seeks to regulate the solicitation practices of charitable organizations within Clearwater by requiring a registration statement be filed with the City Clerk by the

charitable organization seeking to solicit funds. The ordinance also requires the charitable organizations which solicit funds to maintain records and documents necessary to complete a registration statement and the City Attorney is given the authority to investigate charitable organizations which solicit funds if complaints are received from ten or more individuals.

On January 20, 1984, Americans United for Separation of Church and State; National Council of the Churches of Christ in the U.S.A.; The American Jewish Committee; Suncoast American Baptist Church; Joyce Parr, individually and as Moderator of the Suncoast American Baptist Church; and James A. Christison, individually, and as Treasurer of the Suncoast American Baptist Church, filed a

complaint seeking injuncitive (sic) relief against the City of Clearwater; Mayor of the City of Clearwater; City Manager of the City of Clearwater; City Clerk of the City of Clearwater; and City Attorney of the City of Clearwater (case 84-97-CIV-T-17).

On January 23, 1984, the Church of Scientology Flag Service Organization, Inc. filed a complaint seeking injunctive relief against the City of Clearwater; the City Attorney of the City of Clearwater; and the City Clerk of the City of Clearwater (Case 84-96-CIV-T17).

For the purpose of reviewing the facial validity of the city ordinance, these cases were joined, and on March 9, 1984, the Court heard oral arguments. At the end of their presentations, the Court instructed counsel that they were to

provide any post-hearing memorandum of law to the Court by March 16, 1984, as the Court intended to rule on the facial validity of the ordinance by the end of March 1984. On March 15, 1984, the Clearwater City Commission passed an amended ordinance which incorporated some of the arguments Plaintiffs' counsel presented to the Court on March 9, 1984.

Despite the fact that the City of Clearwater has amended their ordinance, the Court feels that it has jurisdiction to consider the facial validity of Ordinance Number 3091-83 as presented in the complaints and argued by counsel March 9, 1984. The reason is quite simple: to decide otherwise would encourage a municipality to enact laws which apparently affect the constitutional rights of its citizens and upon

those laws being legally challenged, to then amend them and effectively prolong the period of time during which citizens are unsure of their constitutional rights.

Another reason the Court feels that it should rule on this question is because of the large number of cases pending, and needing, the Court's time. This Court must let parties have their day in court but will not permit them to have someone else's day. In short, the Court does not intend for cases to go on forever. There reaches a point of decision in all cases, and for Ordinance Number 3091-83, that point of decision is here.

The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and

§ 1343(a)(3) and the Doctrine of Pendent Jurisdiction. Venue is proper pursuant to 28 U.S.C. § 1391(b).

A cursory reading of Ordinance 3091-83 should indicate even to a layman that the ordinance impacts upon First Amendment freedoms. We read a great deal about the First Amendment and often one wonders if we fully consider the simplicity, yet majesty of the phrases our forefathers put together to establish the freedoms which make the United States the most unique country on earth.

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacebly to assemble, and to petition the government for a redress of grievances.

There are a few fundamental principles regarding the establishment and free exercise of religion clauses of the First Amendment:

All persons must be free to practice their faith without governmental intrusion or regulation. If government does seek to regulate, and the regulation impacts on religious practice, the governmental regulation must be in the furtherance of a compelling state interest and the government regulation must be the least restrictive means necessary to further that compelling state interest. **Sherbert v. Verner,** 374 U.S. 398 (1963); **Wisconsin v. Yoder,** 406 U.S. 205 (1972).

The government, in pursuing its legitimate, secular purposes, must avoid administrative entanglement with religious institutions. **Walz v. Tax**

Commission of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971).

The government must avoid associations favoring or opposing religion in general or specific religions in particular whether such discrimination is intentional or de facto. Abington School District v. Schempp, 374 U.S. 203 (1963) Larson v. Valente, 456 U.S. 228 (1982).

The government may not evaluate the benefits of religious practice including the truth or falsity of statements about the benefits of religious practices under any circumstances. United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

Laws enacted to regulate public solicitations by religious, political, and social organizations often impact on the religious guarantees of the First Amendment together with the freedom of speech and association protections in that amendment. Several principles have been developed to judge such laws.

Public solicitation is a protected activity under the First Amendment because, as a practical matter, fund raising is necessary for a church or association to survive and because it is an effective method of reaching the audience or membership to "get the word out". Cantwell v. Connecticut, 310 U.S. 296 (1940); Fernandes v. Limmer, 663 F.2d 619 (5 Cir. 1981).

There are areas in which the state may have an important interest in regulating solicitation activities of the public. The state or municipality has a legitimate interest in seeking to avoid disturbances of the peace and insuring public safety, and therefore, certain time, place, and method restraints can be placed on solicitation activities. Courts have also recognized that a state or municipality has an interest in prohibiting "fraud" in solicitations. In this regard, a municipality may regulate to insure that funds raised actually find their way to the organization for which the solicitation was given. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

The regulatory authority (ie. government) may not attempt to regulate the content of the representations made to induce contributions on the basis that the representations falsely state spiritual, emotional, or other benefits which may accrue to the contributor in this world or the next. **United States v. Ballard,** 322 U.S. 78 (1944).

As is the case with most statutes which impact upon First Amendment freedoms, any regulation of public solicitation must be by the least restrictive means necessary to further the compelling state interests. **Fernandes v. Limmer,** 663 F.2d 619 (5 Cir. 1981). No discretion must be left to the administrative and enforcement officials as to the scope or breath [sic] of the regulation **Hynes v. Mayor and Council of**

the Borough or Oradell, 425 U.S. 610 (1976); Village of Schaumberg (sic) v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Regulations concerning solicitations must be limited to those solicitations of the public in public places. International Society of Kirshna (sic) Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5 Cir. 1982). Regulation of solicitations on the premises of a church or political association is not necessary because that activity could not disturb the public; there is not a danger of misrepresentation in this solicitations, by the organization for which contributins were sought. See City of Houston supra, at 562.

Any regulation of public solicitations must not effect a prior restraint upon such activities. Prompt and adequate judicial review procedures including appeal must be available to insure that decisions made by administrators do not effectively forestall First Amendment activities which should be allowed. **Fernandes v. Limmer**, supra at 628.

The state may not pass laws which aid one religion or which prefer one religion over another. This principle of neutrality among religions requires the court to examine this ordinance on its face to determine whether it will have a discriminatory or unequal effect upon different religious groups or practices by exempting some churches or religious organizations, and, subjecting others to

regulations or burdens. **Epperson v. Arkansas**, 393 U.S. 97 (1968); and **Larson v. Valente**, 456 U.S. 228 (1982).

If the Court finds such a result, i.e., discrimination, the legislation must be struck down unless the discriminatory features are necessary to further a compelling state interest and unless there exists no less restrictive means to accomplish the state interest without imposing disparate burdens upon religious groups **Larson v. Valente,** supra, at 244-255.

In **Larson** the Supreme Court found that an ordinance which created a disparate impact upon smaller religious groups and exempted more established churches, could not be justified by a compelling interest. The court went on to find that the ordinance imposed

registration and reporting requirements on some religious organizations, but not on others; this non-evenhanded operation created an indication of official denominational preference.

Clearwater Ordinance 3091-83 exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5)). Churches which obtain contributions from members who participate in church services on a non-regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are <u>not</u> exempt. Thus, a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and

actively engaged in proselytizing and fund raising falls under the regulatory scheme of this ordinance.

How can a church whose congregation or group of members is growing, ever, at any given time, indicate to civil authority the number of "members" it has in regular attendance or as participants in the organization?

If a drunk were to stagger into a church and "be saved" and then indicate an intention to dedicate his life to its purposes through regular attendance at that church, would he be a "member"?

There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance. This ordinance not only impies a religious preference, its mere

presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

The Defendant has indicated, during oral argument, that the Clearwater ordinance was modeled after a recent ordinance in the City of Houston and therefore this ordinance should be upheld upon the authority of **International Society for Krishna Consciusness of Ouston, Inc. v. City of Houston, Texas,** 689 F.2d 541 (5 Cir. 1982). The Court finds there is no safe harbor for Clearwater in the **City of Houston** as the Houston ordinance did not license the discriminatory power in administrative officials plus the investigatory and

enforcing powers which the Clearwater ordinance encompasses. In fact, the Houston ordinance did not grant the power to officials charged with enforcing the solicitation ordinance to conduct investigations, compel disclosure, and prosecute organizations who must register. The Firth Circuit recognized and emphasized Houston's amendment of their ordinance was critical in that Court's decision upholding the ordinance, as the amended ordinance eliminated language allowing enforcing officials in Houston to "make such investigation as he may deem necessary to ascertain the truth of the facts and information set out" in the registration statement.

In Clearwater's ordinance, the City Attorney is granted broad investigatory powers to investigate violations of the

prohibited acts section of the ordinance (see Section 100.06, 100.05(a)(b), 100.05(1)(a), 100.05(1)(c), 100.05(1)(g). The Clearwater ordinance does precisely what the Fifth Circuit emphasized the Houston ordinance did not.

The enforcement provisions of the ordinance do not contain articulated standards indicating when the City Attorney should or will investigate an organization against which ten complaints have been filed. This vagueness in determining when the City Attorney will conduct an investigation when ten complaints have been filed against an organization creates an opportunity for arbitrary and subjective enforcement of a law infringing on constitutional rights and accordingly, it is unconstitutional. Grayned v. City of Rockford, 408 U.S. 104

(1972); Baggett v. Bullitt, 377 U.S. 360 (1964); Kolender v. Lawson, ___ U.S. ___, 75 L.Ed.2d 903 (1983) (involving a criminal statute).

At oral argument counsel for Americans United described the ordinance as one in which "a shot gun was used to shoot a mouse". This Court would not state that analogy as a test for constitutionality; however, the Court is compelled, upon review of Clearwater Ordinance 3091-83 to declare the ordinance unconstitutional as it will impact upon smaller churches with growing or changing congregations, requiring smaller churches to be subjected to regulation while exempting more established congregations, thereby violating the principle of neutrality without a compelling state interset.

Further, the Court finds that the instant ordinance is quite different than that addressed by the Fifth Circuit in the **City of Houston.**

Accordingly, the Court declares Clearwater City Ordinance Number 3091-83 unconstitutional and permanently enjoins its application or enforcement.

Case 84-97 is hereby **dismissed** and Case 84-96 is hereby dismissed as to Counts Two through Twelve of the complaint; the Clerk is directed to enter judgments for the respective Plaintiffs against Defendants. Jurisdiction is retained for the enforcement of the executory provisions herein.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 28th day of March, 1984.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All Counsel of Record

APPENDIX C

Order of the United States District Court
For the Middle District of Florida
Temporarily Restraining Enforcement of
Ordinance No. 3479-84

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff

Case No.
84-96-Civ.T-17

vs.

CITY OF CLEARWATER, THOMAS
BUSTIN, City Attorney of the
City of Clearwater, and
LUCILLE WILLIAMS, City Clerk
of the City of Clearwater,

Defendants /

TEMPORARY RESTRAINING ORDER

This matter coming on to be heard before the Court on Plaintiff's Motion for Temporary Restraining Order, and Memorandum of Law in support of that Motion, and the Court having duly considered the same, as well as the allegations of the proposed Supplemental

Complaint, and the Affidavit of Mary Story, and being otherwise fully advised in the premises, the Court finds:

1. Plaintiff seeks the entry of a temporary restraining order, temporarily enjoining the Defendants, THE CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney, and LUCILLE WILLIAMS, City Clerk, together with their officers, agents, servants, employees and attorneys, from enforcing, or attempting to enforce, any of the provisions of Clearwater Ordinance No. 3479-84 against the plaintiff, or any of its officers, employees, or agents, or from subsequently imposing, or attempting to impose, any sanctions or punishments of any kind whatsoever against the Plaintiff, or any officers, employees, or agents of the Plaintiff, for their failure to comply with any of the pro-

visions of this Ordinance, pending a hearing on Plaintiff's Motion for a Preliminary Injunction.

2. In the event that Defendants are not temporarily enjoined from enforcing, or attempting to enforce the provisions of Ordinance No. 3479-84 against the Plaintiff, the Plaintiff, its officers, agents, employees, servants and members will be subject to terms of imprisonment and fines, and, presumably, will forfeit their rights to engage in religious fund raising activities. In addition, Plaintiff, its officers, agents, employees, servants and members are threatened with imminent investigation of internal church matters, with the denial of its rights to obtain and make contributions, and with the imminent imposition of serious civil and criminal penalties unless it refrains

from the dissemination of religious ideas and from engaging in the practice of religion.

3. In the event that a temporary restraining order is issued, neither the Defendants, nor any other persons or entities, or the public at large, would be prejudiced.

4. The facts set forth in the proposed Supplemental Complaint demonstrate that there is no need or necessity for the posting of security pursuant to Rule 65(c), F.R. Civ. P.

5. Plaintiff's Motion for Leave to File Supplemental Complaint should be granted.

Accordingly, and based upon the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Leave to file Supplemental Complaint is hereby granted.

2. Plaintiff's Motion for Temporary Restraining Order is hereby granted.

3. The Defendants, as well as their officers, agents, servants, employees and attorneys, are hereby restrained and enjoined from enforcing, or attempting to enforce, any of the provisions of Clearwater Ordinance No. 3479-84 against the Plaintiff, or any of its officers, employees, agents, servants or members, and from subsequently imposing, or attempting to impose, any sanctions or punishment of any kind whatsoever against the Plaintiff, as well as any of its officers, employees, agents, servants or members, for their failure to comply with any of the provisions of Clearwater

Ordinance No. 3479-84, pending a hearing on Plaintiff's Motion for a Preliminary Injunction.

3. (sic) A hearing on Plaintiff's Motion for Preliminary Injunction is hereby scheduled for April 27, 1984 at 3:00 p.m.

DONE and ORDERED in Chambers, Tampa, Hillsborough County, Florida, this 20th day of April, 1984.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:

Paul B. Johnson, Esq.
Johnson, Paniello & Hayes

John T. Blakely, Esq.

Frank Kowalski, Chief Assistant
City Attorney

APPENDIX D

Oral Opinion of the United States District Court For the Middle District of Florida on the Facial Validity of Ordinance No. 3479-84

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC., et al.,

Plaintiffs,

Case No. 84-719-CIV-T-17 [84-96-CIV-T-17]

vs.

Tampa, Florida July 13, 1984

CITY OF CLEARWATER, et al.,

Defendants.

EXCERPT OF HEARING ON FACILE (sic) VALIDITY OF A MUNICIPAL ORDINANCE BEFORE THE HONORABLE ELIZABETH A. KOVACHEVICH

TRANSCRIPT ORDERED BY:
JOHN T. BLAKELY, Esquire

APPEARANCES:

FOR THE PLAINTIFFS:

LEE BOOTHBY, Esquire
208 W. Mars
Berrien Springs, Michigan 49103

FRANK M. PALMOUR, P.A.
Post Office Drawer 2398
Winter Park, Florida 32789

ERIC M. LIEBERMAN, Esquire
KATHERINE STONE, Esquire
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN
30 East 42nd Street
New York, New York 10017

EARL W. TRENT, JR. House Counsel
American Baptist Church in U.S.A.
Valley Forge, Pennsylvania 19481

PAUL B. JOHNSON, Esquire
JOHNSON, PANIELLO & HAYES
Post Office Box 3416
Tampa, Florida 33601

FOR THE DEFENDANTS:

JOHN T. BLAKELY, Esquire
ROBERT G. WALKER, JR., Esquire
City Attorneys for the
City of Clearwater
Post Office Box 4748
Clearwater, Florida 33518

P R O C E E D I N G S

THE COURT: Good afternoon, ladies and gentlemen in the courtroom. If you will, ladies and gentlemen, for purposes of the record and for the court reporter after I call this case, to make sure we are getting the right numbers and also to identify yourselves and who you represent for these proceedings.

Originally there were cases that were filed 84-96 and 84-97, involving respectively under 84-96, the Church of Scientology versus Clearwater, et al. And then under 84-97 it was Americans United For Separation of Church and State, et al versus Clearwater, et al, which was 84-97. The 84-97 case is closed. The 84-96 is not closed and its companion case is 84-719, Church of Scientology versus Clearwater, et al.

The Americans United For the Separation of Church and State, et al. versus Clearwater, et al, is now 84-699.

Would you stand, left to right, as I look at you, and identify yourselves and indicate who you represent and tell me whther or not we called the right numbers. Left to right -- Mr. Blakely.

MR. BLAKELY: John Blakely. I represent the City of Clearwater. I believe the numbers you called are correct.

THE COURT: Thank you.

MR. WALKER: Robert Walker. I represent the City of Clearwater, too.

MR. BOOTHBY: Lee Boothby. I represent the Plaintiffs in Case Number 84-699-Civ-T-17, Your Honor.

MR. PALMOUR: Frank Palmour, Your Honor. I also represent the Plaintiff in Case 84-699.

MR. LIEBERMAN: Eric Lieberman, representing the Church of Scientology in both 84-96 and 84-719. I believe the case numbers are correct.

MS. STONE: Katherine Stone. I also represent the Church of Scientology and 84-96 and 84-719.

MR. TRENT: Earl Trent. I represent the American Baptist Church in the U.S.A. I believe the case numbers are correct.

THE COURT: All right. Thank you very much, gentlemen and ladies. The last time that we came before the Court for a hearing in this case, this Court rendered a certain opinion in which the Court made certain specific findings declaring the ordinance to be unconsti-

tutional. Those particular matters, I think, could be concisely stated as the difficulty with the membership provision and the discretionary phase of the ordinance relative to the enforcement by the City attorney. Since that time an amended ordinance has been passed and it is the subject of the litigation before this Court. Once again, we are confronted with facial validity of this ordinance.

Are we all in agreement with regard to that as the purpose of this hearing, the facial validity of an ordinance? Mr. Blakely?

Mr. Walker?

MR. BLAKELY: Your Honor, that is my understanding and because of that I noticed in the briefs that were filed, there was frequent reference to affida-

vits that were filed by Plaintiffs and in the last reply brief filed by the Americans United, there was frequent reference to a deposition that was taken of Mr. Bustin last week. I assume, because we are only considering the facial validity of the ordinance, that this Court will not permit reference to affidavits or depositions during this proceeding today; is that correct:

THE COURT: That is correct. For the purpose of this proceeding today, I knew there have been Motions for Summary Judgment and things of that nature that have been filed, and this Court has determined to -- consistent with what we did the last time and consistent with the representations that I made to counsel to deal with the facial validity of the ordinance. And that is what I want to

deal with. If there is anything further that has to be done after that, then we will consider that matter. But that is what I want to address, the facial validity. Now, that is your understanding? Also we do not have a problem, once again, with standing.

MR. BLAKELY: We are not contesting standing today.

THE COURT: You are not contesting standing -- just facial validity. You agree, Mr. Blakely?

MR. BLAKELY: Yes, Your Honor.

* * * *

THE COURT: I'm ruling right now.

This court has examined the case as it commenced this year, examined its memorandum opinion and order entered

herein, and has mentioned to you at the commencement of our proceedings today, that the questions with regard to membership and the discretion of the City were paramount in our determination of the unconstitutionality of this Ordinance.

This Court considered severability and did not believe that it was appropriate at this time.

The Ordinance has been amended and the Court has to look at it de novo to make a determination facilely (sic) with regard to this Ordinance.

This Court wants to reemphasize the role that any Judicial Officer has representing the third branch of government. We interrupt (sic) the laws that are made by the legislative bodies, whether those legislative bodies are

Congressional, whether they are legislative bodies of a Sovereign State, or the legislative bodies of Municipal Ordinances.

The individuals who make the laws are the elected representatives of the people, who in making these laws, provide contemporary expression of the public's will and the public's policy.

What may have been the situation back in the 1800's and the early 1900's may not be the circumstances today. And this Court notes that this case has far reaching implications and that it may well find itself before the Supreme Court of the United States before it is ultimately resolved by the Supreme Judicial Authority in this country.

The cases that occurred in Texas are of particular note to this Court. The Ordinance that was passed in Houston was initially passed back in 1969. It was tested by the Plaintiff back in 1979, and there was an expression rendered by the Fifth Circuit Court of Appeals in 1982. And the Court's decision responded to an Ordinance that was passed expressing the will of the people regarding financial disclosure in charitable solicitation situations.

One year later in the City of Humble, Texas, in the Case of Poe versus the City of Humble, Texas, reported at 554 Federal Supplement 233, a member of a religious society brought action challenging the constitutionality of a Religious Solicitation Ordinance and the Federal Judge in that situation upheld

the constitutionality of that Ordinance citing the City of Houston Case. Now, in 1984, we have the City of Clearwater expressing through it's elected representatives the will of the people of the City of Clearwater. Expressing what they determine to be their public policy and the controls that they wish to exhibit with regard to financial disclosure and charitable solicitations. This Court is not confronted with the making of that law and the why of the making of that law. What this Court is confronted with is the Facile (sic) Validity and constitutionality of that law. It would appear to this Court, and I specifically rule -- and Mr. Blakely you can prepare an order to this effect, because I think the best interests of everyone are served by this -- that this Court finds

specifically that each and every section of the Amended Ordinance 34-79-84 as it has been amended, 100.01 through 100.13, I believe it is, as amended, is valid -- Facilily (sic) Valid and constitutional.

This Court would note as dictum that the State Attorney of the State of Florida pursuant to Florida Constitution Article 5, Section 17, is authorized by general law to prosecute violations of all Municipal Ordinances that may also be prosecuted by Municipal Prosecuters (sic).

The Court was initially concerned that there could be a year's usurpation of the authority of the State Attorney by that enforcement provision in that Ordinance. The Court has determined that there is no usurpation of the State Attorney's authority here. However, I

note with interest that there may be some very unique proof problems presented when the time may arise for prosecution of this misdemeaner (sic).

This Court would urge an Interlocutory Appeal at this juncture. I think this ought to be tested. I think it has far reaching implications to it. And I think that rather than proceed forward with any form of Evidentiary Hearing, it would be better for this case to go immediately to the Eleventh Circuit and to take it's route from there, if necessary, to the United States Supreme Court.

If no Interlocutory Appeal were taken in this situation, then the enforcement of this Ordinance will become operational immediately, and whatever

flows from that, including Evidentiary Hearings, would have to be set before the Court, etc.

I'm not so sure that that's a wise way to proceed. But, Mr. Blakely, you can prepare a proposed order for this Court to sign.

Mr. Boothby.

APPENDIX E

Order of the United States District Court For the Middle District of Florida on the Facial Validity of Ordinance No. 3479-84

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Case No.
84-96-CIV-T-17

Plaintiff(s),

vs.

CITY OF CLEARWATER,
et al.,

Defendant(s).

ORDER

In their complaint, inter alia, the plaintiffs contend that amended ordinance 3479-84, a copy of which is attached, facially violates the freedom of religion, freedom of press, freedom of speech, and freedom of association guarantees of the First Amendment; the right of privacy guarantee of the First,

Fourth, Fifth, and Ninth Amendments; and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. To facilitate and accelerate the disposition of these claims, the Court requested the parties to submit legal memoranda solely on the issue of the constitutionality of the amended ordinance on its face. Having considered the memoranda, the arguments of the parties, and International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5th Cir. 1982) and Poe v. City of Humble, Texas, 554 F. Supp. 233 (S.D. Texas 1983), the Court now rules that each and every section of amended ordinance 3479-84 is constitutional on its face.

Pursuant to Title 28 U.S.C. §1292(b), the Court expressly opines that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Counsel have indicated to the Court their desire to immediately appeal this Court's ruling; therefore, the Court orders the Clerk of the Court to Administratively Close case numbers 84-96, 84-699, and 84-719 during the pendency of said appeal.

DONE and ORDERED in Chambers, in Tampa, Florida, this 23rd day of July, 1984.

Elizabeth A. Kovachevich
United States District Judge

Copies furnished to:
All Counsel of Record

APPENDIX F

Order of United States District Court For the Middle District of Florida Partially Enjoining Ordinance No. 3479-84

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff,

Case No.
84-96-Civ.T-17

vs.

CITY OF CLEARWATER, THOMAS
BUSTIN, City Attorney of the
City of Clearwater, and
LUCILLE WILLIAMS, City Clerk
of the City of Clearwater,

Defendants. /

ORDER AMENDING PRELIMINARY INJUNCTION

This Court entered a temporary restraining order in this action on April 20, 1984. The temporary restraining order is hereby converted to a preliminary injunction; however the preliminary injunction is limited in its application to those provisions of amended ordinance 3479-84 that impose requirements regarding registration and maintenance of

records pertaining to the information in the registration statements. Specifically, by the preliminary injunction, the defendants are hereafter only restrained and enjoined from enforcing Sections 100.03, 100.04, and subparagraphs (d), (i) (j) and (k) of Section 100.05 of amended ordinance 3479-84.

DONE and ORDERED in chambers in Tampa, Florida, this 23rd day of July, 1984.

United States District Judge
ELIZABETH A. KOVACHEVICH
United States District Judge

APPENDIX G

Order of United States District Court For the Middle District of Florida Denying Application For Preliminary Injunction On Ground That Ordinance No. 3479-84 Is Unconstitutional As Applied

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff(s),

Case No.
84-96-CIV-T-17

v.

CITY OF CLEARWATER, et al.,

Defendant(s). /

ORDER

The Court hereby makes the following orders regarding this case:

1. Plaintiff's motion for a temporary restraining order is **denied.**

2. Plaintiff's motion for a preliminary injunction is **denied.**

3. This case will continue to be administratively closed pending appellate review.

DONE and **ORDERED** in Chambers, in Tampa, Florida, this 2nd day of August, 1984.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All Counsel of Record

APPENDIX H

Order of the United States Court of Appeals For the Eleventh Circuit Granting Leave to Appeal and Staying Enforcement of Ordinance No. 3479-84 Pending Appeal

FILED AUGUST 17, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3543, 84-3544,
84-3545, 84-3546,
84-2055 and 84-2056

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.,

Plaintiff-Appellant,

v.

CITY OF CLEARWATER, et al.,

Defendants-Appellees.

Appeal from the United States
District Court
for the Middle District of Florida

(, 1984)

Before: HILL, FAY and HATCHETT,
Circuit Judges

B Y T H E C O U R T:

Appellant's emergency motion for an injunction pending appeal in the above numbered cases is GRANTED. Appellees are hereby enjoined from enforcing Ordinance No. 3479-84 during the pendency of the appeal in these cases.

Further, appellant's motion in Nos. 84-2055 and 84-2056 for leave to appeal from the interlocutory order of the United States District Court for the Middle District of Florida signed on July 23, 1984, and filed on July 24, 1984, is GRANTED. These cases, while not ordered expedited, shall, when briefing is completed, be set for oral argument and heard together with the appeal in case No. 84-2057.

APPENDIX I

Order of the United States Court of Appeals For the Eleventh Circuit Denying Petition for Rehearing and Suggestion of Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3543, 84-3544,
84-3545, 84-3546, 84-3574

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Plaintiff-Appellant,

versus

CITY OF CLEARWATER, et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 13, 1985), 11 Cir., 198_, ___F.2d___).

(Filed December 19, 1985)

Before TJOFLAT and KRAVITCH, Circuit Judges, and Dumbauld*, District Judge.

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* Hon. Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

APPENDIX J

Clearwater Ordinance No. 3479-84

ORDINANCE NO. 3479-84

AN ORDINANCE OF THE CITY OF CLEARWATER, FLORIDA, AMENDING SECTION 100.01, DEFINITIONS, SECTION 100.02, EXEMPTIONS, SECTION 100.03, REGISTRATION WITH CITY CLERK, SECTION 100.04, MAINTENANCE OF RECORDS, SECTION 100.05, PROHIBITED ACTS, SECTION 100.06, POWER OF THE CITY ATTORNEY TO INVESTIGATE AND PROSECUTE PROHIBITED ACTS OF CHARITABLE ORGANIZATIONS, SECTION 100.07, DAMAGE TO INJURED PERSONS, SECTION 100.08, NOTICE TO THE PUBLIC ABOUT THE PROVISIONS OF THIS CHAPTER, OF CHAPTER 100, SOLICITATION OF FUNDS FOR CHARITABLE PURPOSES, OF TITLE VIII, PUBLIC HEALTH AND SAFETY, OF THE CODE OF ORDINANCES, CITY OF CLEARWATER; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "CHARITABLE ORGANIZATION"; TO REVISE AND EXPAND THE DEFINITION OF THE TERM "SOLICIT FUNDS" TO INCLUDE A SERIES OF ITEMS WHEREUPON REPRESENTATION OF THE PROCEEDS OF THE SALE OF SUCH ITEMS WILL BE USED FOR THE CHARITABLE PURPOSE; TO REMOVE THE DEFINITION OF THE TERM "MEMBER" AND THE DEFINITION OF THE TERM "NATIONAL ORGANIZATION"; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "PROFESSIONAL SOLICITOR"; TO REVISE EACH OF THE EXEMPTION CATETORIES [SIC] AND REMOVE LANGUAGE RELATING TO FUNDS IN EXCESS OF $10,000; TO REMOVE LANGUAGE RELATING TO THE MAINTENANCE OF RECORDS; TO REMOVE LANGUAGE RELATING TO THE ISSUANCE OF AN ANNOUNCEMENT OR ADVERTISEMENT; TO REQUIRE IN THE REGISTRATION STATEMENT AN ESTIMATED PERCENTAGE OF THE TOTAL PROJECTED

COLLECTIONS WHICH THE COST OF THE SOLICITATION WILL COMPRISE; TO REQUIRE IN THE REGISTRATION STATEMENT THAT A CHARITABLE ORGANIZATION WILL MAINTAIN THE RECORDS AND DOCUMENTS NECESSARY TO FILE THE REPORTING STATEMENT AND PROVIDE A DESCRIPTION OF THOSE RECORDS AND DOCUMENTS; TO REQUIRE THE FILING OF A DECLARATORY JUDGMENT ACTION WHERE THE CITY CLERK HAS DENIED ISSUANCE OF A CERTIFICATE OF REGISTRATION AND THE CHARITABLE ORGANIZATION DISAGREES WITH SUCH DECISIONS; TO PERMIT THE CHARITABLE ORGANIZATION TO SOLICIT FUNDS WITHOUT COMPLIANCE WITH THE REGISTRATION PROVISION UNLESS AND UNTIL THE CIRCUIT COURT RULES THAT THE CITY CLERK'S REFUSAL TO ISSUE THE CERTIFICATE WAS PROPER; TO EXPAND THE SCOPE RELATING TO THE FILING BY A CHARITABLE ORGANIZATION OF ANY SIMILAR REGISTRATION STATEMENT FILED IN ANY STATE, CITY OR COUNTY TO PERMIT THE FILING OF THE SAME WITH THE CITY CLERK; TO REWORD THE REPORTING AND DISCLOSURE PROVISION TO CLARIFY WHAT MONEY AND PROPERTY IS TO BE DISCLOSED; TO REQUIRE THAT CHARITABLE ORGANIZATIONS MAINTAIN RECORDS OR DOCUMENTS NECESSARY TO FILE COMPLETE AND TRUTHFUL STATEMENTS REQUIRED BY SECTOIN 100.03 FOR A PERIOD OF THREE (3) YEARS FROM THE FILING OF EACH STATEMENT AND TO DISPENSE WITH ALL OTHER MAINTENANCE FUNCTIONS; TO DELETE THE POWER OF THE CITY CLERK TO DECLARE A DEFAULT; TO REWORD AND CLARIFY INDIVIDUAL SUBPARAGRAPHS OF THE PROHIBITED ACTS AND TO ADD NEW PROHIBITED ACT RELATING TO THE WILLFUL FAILURE TO MAINTAIN THE RECORDS OR DOCUMENTS REQUIRED BY SECTION 100.04;

TO ADD A NEW PROHIBITED ACT RELATING TO PRIVATE STATEMENTS; TO MAKE THE INVESTIGATION TO BE PERFORMED BY THE CITY ATTORNEY MANDATORY IN CHARACTER; TO GRANT THE CITY ATTORNEY SUBPOENA POWER WITH RESPECT TO THE RECORDS OR DOCUMENTS DESCRIBED IN SECTION 100.04; TO DELETE THE SUBPARAGRAPH RELATING TO THE CITY ATTORNEY'S ACCESS TO PUBLIC RECORDS AS BEING UNNECESSARY IN LIGHT OF CHAPTER 119, FLORIDA STATUTES; TO PERMIT THE CITY ATTORNEY TO PROSECUTE VIOLATIONS OF THE PROHIBITED ACTS WHERE PROBABLE CAUSE EXISTS; TO PERMIT A CHARITABLE ORGANIZATION TO EXCLUDE SOLICITATION INFORMATION RELATING TO MEMBERS FROM ITS REGISTRATION STATEMENT WHERE A PRIVATE STATEMENT IS MAINTAINED; AND TO CHANGE INDIVIDUAL WORDS AND PUNCTUATION FOR SENSE AND CLARITY; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT HEREWITH TO THE EXTENT OF SUCH CONFLICT; PROVIDING FOR AN EMERGENCY PURSUANT TO SECTION 166.041, FLORIDA STATUTES; DECLARING THAT THE CITY OF CLEARWATER IS EXEMPT FROM PINELLAS COUNTY ORDINANCE 82-38; DECLARING THAT A PUBLIC EMERGENCY EXISTS AFFECTING THE WELFARE OF THE CITIZENS OF THE CITY OF CLEARWATER; AND PROVIDING FOR THE EFFECTIVE DATE OF THIS ORDINANCE.

WHEREAS, the City of Clearwater, Florida, is presently involved in litigation directed toward the validity of Chapter 100 of the Clearwater Code of Ordinances; and

WHEREAS, Fifth Circuit Judge Wisdom, in similar litigation involving the City of Houston, Texas, commended the City for further narrowing its ordinance during the pendency of that litigation; and

WHEREAS, it would further serve the purpose for which Chapter 100 was created to narrow and refine the scope of each provision and thereby preserve the integrity of that chapter and the public purpose it serves; and

WHEREAS, just like the City of Houston, it is felt that further refining and narrowing should be accomplished prior to the conclusion of the litigation mentioned herein; and

WHEREAS, an emergency exists within the City of Clearwater in that it is immediately necessary that the scope and wording of Chapter 100 of Clearwater Code of Ordinances be further narrowed and refined by addressing each and every narrowing type of question that could be raised prior to the termination of the litigation mentioned herein, thereby preserving and enhancing the public purpose for the ordinance and the welfare of the citizens of the City of Clearwater.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA;

Section 1. That Section 100.01, Definitions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.01. Definitions.

As used in this chapter,

(1) The term "charitable organization" shall mean an organization or person which is or holds itself out to be a benevolent, educational, voluntary health, philanthropic, humane, religious or eleemosynary organization that

solicits funds ~~or obtains contributions solicited from the public~~ for charitable purposes. ~~A branch, area, chapter, office or similar affiliate or any person soliciting contributions within the City of Clearwater for a charitable organization that has its principal place of business outside the City shall be a charitable organization for the purposes of this chapter.~~

(2) The term "solicit funds" or "solicitation of funds" shall mean any request within the City of Clearwater, for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or personal, tangible or intangible,

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whether of value or not, including, but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined. Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the City.

(3) The term "charitable purpose" shall mean benevolent, philanthropic, educational, religious, humane, voluntary

health, or other non-profit objectives, including the benefit of poor, needy, sick, refugee or handicapped persons; the benefit of any church or religious society, sect, group, or order; the benefit of any fraternal, social or civil organization, or the benefit of any educational institution. The term "charitable purpose" shall not be construed to include the direct benefit of the individual making the solicitation. The term "charitable purpose" shall not be construed to include the benefit of any political group or political organization that is subject to financial disclosure under state or federal law.

(4) The term "individual" shall mean only a natural person.

(2) The term "solicit funds" or "solicitation of funds" shall mean any request, within the City of Clearwater, for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or personal, tangible or intangible, whether of value or not, including, but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined. Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of

membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the City.

(3) The term "charitable purpose" shall mean benevolent, philanthropic, educational, religious, humane, voluntary health, or other non-profit objectives, including the benefit of poor, needy, sick, refugee or handicapped persons; the benefit of any church or religious society, sect, group, or order; the benefit of any fraternal, social or civil organization, or the benefit of any educational institution. The term "charitable purpose" shall not be construed to include the direct benefit of

the individual making the solicitation. The term "charitable purpose" shall not be construed to include the benefit of any political group or political organization that is subject to financial disclosure under state or federal law.

(4) The term "individual" shall mean only a natural person.

~~(5) The term "member" shall mean any person regularly attending or participating in a charitable organization.~~

~~(6) The term "national organization" means that part of a charitable organization that coordinates, supervises, or exercises control over policy, fund-raising, or expenditures, or assists or advises one or more chapters, branches, areas, officers, or affiliates in the City.~~

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(~~7~~ 5) The term "professional solicitor" means ~~any person who, for a financial or other consideration, solicits contributions for, or on behalf of, a charitable organization whether such solicitation is performed personally or through agents, servants, or employees specifically employed by or for a charitable organization, who are engaged in the solicitation of contributions under the direction of such person; however, no agent, servant, or employee of a professional solicitor shall be deemed to be a professional solicitor. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the state shall not be deemed to be a professional solicitor. No attorney, registered~~

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~~investment counselor, CPA or accountant, or banker who advises any person to make a contribution to a charitable organization shall be deemed, as a result of such advice, to be a professional solicitor~~ any person who is compensated for his or her or its solicitation of funds for charitable purposes in any manner whatsoever that is based on or related to the amount of money or property collected as a result of his or her or its solicitations of funds.

Section 2. That Section 100.02, Exemptions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clear-

water, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.02. Exemptions.

(1) Notwithstanding the foregoing, a charitable organization that does not employ a professional solicitor to solicit funds shall be exempt from the provisions ~~of this chapter~~ of Sections 100.03 and 100.04;(a) if it ~~does~~ did not ~~receive contributions~~ collect money or property from more than 20 persons as a result of the solicitation of funds during the preceding twelve (12) months; ~~or~~ (b) if all of its functions, including fund raising activities, within the City of Clearwater, are carried on by persons who are unpaid for their services; ~~or~~ (c) if no part of the charitable organiza-

tion's assets or income inures to the benefit of or is paid to any officer or member; ~~or if the solicitation is in the form of a donation or collection that occurred within the membership of the charitable organization; or~~ (d) if the charitable organization ~~does not raise or receive contributions from the public~~ did not collect money or property as a result of the solicitation of funds in excess of $10,000 during ~~its annual reporting~~ period the preceding (sic) twelve (12) months. ~~Nevertheless, if the contributions raised from the public are in excess of $10,000 for said annual reporting period, the charitable organization shall, within 30 days after the date it shall have received total contributions in excess of $10,000,~~

register subject to the provision of this chapter. Any such exempt charitable organization shall lose such exemption when it employs a professional solicitor. Nevertheless, such organization shall maintain such records as necessary to prove that the organization qualifies for such exemption.

(2) Every scholarship fund that solicits and raises funds solely for the purpose of providing scholarships shall be exempt from the registration provisions provided for in this chapter if all of the fund's functions, including fund raising activities, are carried on by persons who are unpaid for their services and if no part of the organiza-

tion's assets or income inures to the benefit of, or is paid to, any officer or member.

~~(3)~~ The issuance of any ~~announce-~~ ~~ment or~~ advertisement ~~that~~ such ~~solici-~~ ~~tation~~ as described ~~in~~ ~~subsection (2)~~ above will ~~occur~~ or ~~which~~ announces ~~or~~ ~~advertises~~ an event at ~~which~~ ~~unannounced~~ ~~solicitation~~ as ~~described~~ ~~in~~ ~~subsection~~ ~~(2) above~~ occurs ~~shall~~ ~~be exempt from the~~ registration ~~provisions of this chapter.~~

(3) If a charitable organization does not want to disclose publicly the information required by the statements described in Section 100.03 regarding the solicitation of funds from members of the charitable organization, it may exclude this information from the statements required by Section 100.03 if:

(a) it indicates on the statement required by Section 100.03 that information about solicitation of funds from members of the charitable organization has been excluded, and

(b) it prepares a private statement at least annually that contains all of the information required by the statements described in Section 100.03 for the solicitation of funds from members of the charitable organization that is not reported in the statements required by Section 100.03, which is signed under oath by the individual described in subparagraph 1(o) of Section 100.03, and

(c) it maintains the records and documents that are necessary to complete this private statement for a period of three years from the date of each state-

ment, and together with the private statement, makes them reasonably available for inspection by every member of the charitable organization.

Section 3. That Section 100.03, Registration with City Clerk, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or reletterd where necessary to read as follows:

Section 100.03. Registration with City Clerk

1. All charitable organizations soliciting funds ~~or desiring to solicit funds~~ for a charitable purpose in the City of Clearwater ~~shall maintain records, documents~~ and ~~information~~ ~~and~~

shall file a registration statement on forms provided by the City Clerk on or before January 31st of each year. At the time of filing such registration statement, the charitable organization shall pay a registration fee of $10.00. The forms shall contain the following information:

(a) The name of the person registering and desiring to solicit funds for charitable purposes.

(b) Whether the person registering is a natural person, partnership, corporation, or association and,

(i) if a natural person, the business or residence address and telephone number must be given.

(ii) if a partnership, the names of all partners and the principal business address and telephone number of each partner must be given.

(iii) if a corporation, the person registering must state whether it is organized under the laws of Florida or is a foreign corporation, and must show the mailing address, business location, telephone number, name of individual in charge of soliciting funds in Clearwater of such corporation, and the names of all officers and directors or trustees of said corporation, and, if a foreign corporation, the place of incorporation and registration date and certificate to operate in Florida as a foreign corporation.

(iv) if an association, the registration statement shall show the association's principal business address and telephone number, if any, and shall show names and principal business or residence addresses and telephone numbers of the officers and directors or trustees of the association. If the association is part of a multi-state organization or association, the mailing address and business location of its central office shall be given, in addition to the mailing address and business location of its local office.

(c) A reference to all determinations of tax-exempt status under the Internal Revenue Code of the United States and law of any state, and the laws of any county or municipality.

(d) A brief description of the charitable organization registering, the charitable purpose for which the funds are to be solicited, and a brief explanation of the intended use of the funds toward that purpose.

(e) The names, mailing address and telephone number of all individuals authorized to disburse the proceeds of the solicitation.

(f) The names, mailing address and telephone number of all individuals who will be in direct charge or control of the solicitation of funds.

(g) The time period within which the solicitation of funds is to be made, giving the date of the beginning of solicitation and its projected conclusion.

(h) A brief description of the methods and means by which the solicitation of funds is to be accomplished.

(i) An estimated schedule of salaries, wages, fees, commissions, expenses and costs to be expended and paid in connection with the solicitation of funds and in connection with their disbursement, and an estimated percentage of the total projected collections which the costs of solicitation will comprise.

(j) The names of any other cities in Florida in which the person registering has ~~solicited~~ collected funds for charitable purposes within the past five (5) years, but in ~~no~~ the event that the person registering has ~~solicited~~ collected funds for charitable purposes in more than five (5) other cities in

Florida, the person registering may list the five (5) cities in Florida in which the most recent ~~solicitions~~ collections occurred.

(k) A statement to the effect that if a Certificate of Registration is granted, such Certificate will not be used as or represented to be an endorsement by the City or any of its officers or employees.

(l) A statement to the effect that the charitable organization will maintain records or documents that are necessary to file the complete statement required by subparagraph 8 of this section and a brief description of those records or documents.

(~~l~~ m) The names of any officer, director, trustee, partner or any current agent or employee engaging in solicitation of funds who has been convicted of a felony or a misdemeanor involving moral turpitude within the past seven (7) years, the nature of the offense, the State in which the conviction occurred, and the year of such conviction.

(~~m~~ n) A brief explanation of the reasons, if the person registering is unable to provide any of the foregoing information, why such information is not available.

(~~n~~ o) The registration statement must be signed by the applicant, if the person registering is an individual; if the person registering is a partnership, by the partner charged with disbursing

funds solicited; if a person registering is a corporation or an association, by its officers charged with disbursing funds solicited. The individual signing the registration statement shall sign the statement and swear before an officer authorized to administer oaths that he or she has carefully read the registration statement and that all the information contained therein is true and correct.

2. After a review of the registration statement to determine its compliance with this section, and within ten (10) working days of the receipt of the registration statement, the City Clerk shall either issue a Certificate of Registration, as provided in this section, or notify the person registering that the registration statement does not

comply with the requirements of this section and specifically point out what information or explanation has not been furnished that is required before a Certificate of Registration will be issued.

3. If for any reason the City Clerk refuses to issue a Certificate of Registration to any charitable organization that has filed a registration statement and the charitable organization disagrees with this decision, the City of Clearwater shall bear the burden of initiating, within ten working days of the denial, a judicial ~~review~~ proceedings ~~in a court of competent jurisdiction to review the City Clerk's administrative decision~~ in the form of a declaratory judgment action pursuant to Chapter 86,

Florida Statutes, to review the City Clerk's refusal to grant a registration certificate. In any such proceeding, the charitable organization seeking the Certificate or Registration shall be considered a party in interest. ~~-----and shall have the absolute right to receive a set of all review papers, to appear by its own counsel, and to submit any and all documents and papers in opposition to the denial of a Certificate of Registration, and shall have the further right to appeal or to join in any appeal from a final adverse judgment or order.~~ The ~~city shall bear the burden of demonstrating in the administrative review that a compelling and substantial governmental interest exists on the record justifying the denial of the Certificate of Regis--~~

~~tration in the specific instance.~~ Unless or until the circuit court rules that the City Clerk has properly refused to issue a Certificate of Registration, the charitable organization may solicit funds without compliance with the registration provisions of this chapter.

4. In such judicial review proceedings, a charitable organization may also raise the question to the court that furnishing a specific item or items of information or explanations under this ~~section~~ chapter constitutes a special or unique hardship to the charitable organization, and the court shall have jurisdiction in such review process, upon concluding that disclosure constitutes a unique or special hardship, to dispense

with the furnishing of that information or explanation, so that a Certificate of Registration can be issued.

5. The City Clerk shall prescribe the form of the Certificate of Registration. However, each such Certificate of Registration shall be printed in black except that the following shall be printed prominently thereon in red: "The issuance of this Certificate of Registration is not an endorsement by the City of Clearwater or any of its officers or employees". Nor may the Certificate of Registration be used by any charitable organization for promotion purposes. Each Certificate of Registration shall bear a registration number that is the

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same as the file containing the registration statement filed by the registrant.

6. Any charitable organization as defined in Section 100.01(1) that has filed a registration statement with ~~the State of Florida, Pinellas County, or any other municipality or county located in Florida~~ any state, city or county during the preceding twelve (12) months containing substantially the same information under oath as requested in this section and has been issued a registration certificate, may file a copy of such registration statement and registration certificate with the City Clerk and such charitable organization shall be deemed to have complied with the requirements of Section 100.03 relating to the prepara-

tion and filing of a registration statement as long as such prior filing and registration certificate remains valid.

7. All registration statements filed with the City Clerk, whether or not a Certificate of Registration has been issued, shall be a public record and shall be available for inspection by members of the public during regular business hours and copies may be obtained at the regular cost.

8. Within 60 days from the expiration of the Certificate of Registration, the charitable organization shall file with the City Clerk on forms provided by that office a statement regarding all solicitation of funds for the prior year, which statement shall be sworn by an appropriate officer of the charitable

organization and which sworn statement shall show the following: (a) the full amount of ~~funds and/or other property received from the public~~ money and property collected as a result of the solicitation of funds during the ~~previous year~~ annual reporting period; (b) a complete list of any and all expenses incurred in procuring ~~the said~~ those funds. The ~~said~~ list shall be broken down into salaries, wages, fees, commissions, advertising and all other expenses and costs paid in connection with the solicitations of those funds; (c) the bank, if any, where the proceeds of ~~the said~~ those solicitations of funds were placed; and (d) actual or proposed utilization in approximate amounts of the said proceeds.

Section 4. That Section 100.04, Maintenance of Records, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.04. Maintenance of Records.

1. ~~No~~ eCharitable organizations shall ~~fail to~~ maintain records or documents that are necessary to file the complete and truthful ~~registration~~ statements ~~under this chapter~~ required by Section 100.03 for a period of three (3) years from the filing of each statement. ~~Records and documents in this paragraph refer to the information mandated by~~

Section 100.03 and shall be maintained by the charitable organization for a period of (3) three years from registration. A charitable organization, upon the request of the City Attorney in connection with an investigation into possible violations of this chapter, may not refuse to produce information required in the registration statement.

Any charitable organization that is exempt from the provisions of this chapter pursuant to Section 100.02(1) shall not be required to maintain any records or other documents relating to such exemption for more than six (6) months from the date that it solicits or obtains contributions solicited from the public for charitable purposes.

2. If the City Clerk determines that any organization subject to this chapter has failed to maintain documents or records containing information sufficient for the purpose of filing a registration statement, he or she shall notify such organizaton in writing and specify what information it has failed to maintain. If any such organization fails for thirty (30) working days after receipt of notice to provide sufficient evidence of the maintenance of such records and documents without legal excuse, the City Clerk shall declare a default, and such default shall constitute sufficient grounds for the City Attorney to seek and obtain judicial enforcement of this chapter's provisions in a court of competent jurisdiction.

Section 5. That Section 100.05, Prohibited Acts, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.05. Prohibited Acts.

No charitable organization subject to the provisions of this chapter, or no agent, employee, or officer of any such organization shall engage in any of the following prohibited acts:

1. (a) wilful use of any solicited funds or soliciting or retaining funds to support or execute any conduct that is criminal or illegal under

the laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States;

(b) wilful failure to file ~~a registration~~ any statement ~~pursuant to~~ required by this chapter or knowingly making false statements or providing false information ~~with respect to any information or documents provided under the registration requirements of this chapter~~ in those statements;

(c) use of any scheme or artifice to defraud or obtain money or property by means of any false statements or representation;

(d) ~~falsely~~ wilfully concealing the identity of an organization on whose behalf solicitations are being made;

(e) ~~falsely representing~~ knowingly misrepresenting that ~~any contributions~~ the proceeds of any solicitation of funds, under current law, would entitle the donor to a Federal or State income tax deduction;

(f) ~~falsely~~ promising any person that ~~a contribution~~ the proceeds of a solicitation of funds will be refunded upon request, and thereafter willfully failing within 60 days to make a refund that has been requested in writing ~~and within a reasonable period of time~~;

(g) promising any person that refunds of ~~contributions~~ the proceeds of any solicitation of funds will be made upon request without providing such person, at the time such representation

is made, with a written statement of the terms and conditions upon which refunds are made; provided, however, that any statement made in good faith at the time is not prohibited by this section.

(h) soliciting funds at private residences between 11:00 P.M. and 6:00 A.M.;

(i) solicitation of funds by any person on behalf of a charitable organization which has failed to ~~register~~ obtain a Certificate of Registration under this chapter and is not exempt under Section 100.02;

(j) wilful failure to ~~file the records with the City Clerk under this chapter~~ maintain the records or documents required by Section 100.04.

(k) if claiming an exemption under Section 100.02(3), wilful failure to maintain the records or documents required to be maintained by said Section, wilful failure to make the private statement and those records or documents reasonably available for inspection by every member of the charitable organization, or knowingly making false statements or providing false information in the private statement or those records or documents described in said Section.

2. In addition to any other remedy provided by law, any person who wilfully and knowingly commits any of the prohibited acts under this section shall be punishable by a fine not to exceed one

thousand dollars ($1,000.00) or a term of incarceration not to exceed six (6) months, or both.

3. This chapter is not intended to repeal or affect other fraud and consumer protection laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States.

Section 6. That Section 100.06, Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.06. Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations.

1. The City Attorney ~~may~~ shall investigate ~~the solicitation of funds by charitable organizations~~ alleged violations of this chapter only after ten individuals file separate bona fide complaints in writing, sworn to or affirmed, with the City Attorney, setting forth facts demonstrating that one or more of the prohibited acts set forth in Section 100.05 have been engaged in by the charitable organization and that the complaining party has been injured by such act or acts.

2. ~~For purposes of investigating complaints under this section, the City Attorney shall have the power to apply to a court of competent jurisdiction for a~~

~~subpoena or subpoena duces tecum to bring before him or her any person and to require as part of such subpoena the production of relevant documents and records and to administer oaths and take depositions of any such person so subpoenaed. The City Attorney shall have the power to effect service of process of subpoenas, after approval of such subpoena by a court of competent jurisdiction. The wilful failure of a person without lawful excuse to obey a subpoena or subpoena duces tecum shall constitute a prohibited act under this chapter. This provision does not preempt or supersede any other general laws concerning a refusal to obey a valid subpoena.~~ The City Attorney, when conducting an investigation pursuant to

subparagraph 1 shall have the power to subpoena any person, require the production of the records or documents described in Section 100.04 and the private statement and records or documents described in Section 100.02(3). and administer oaths.

~~3. In investigating citizen complaints about a charitable organization's solicitation of funds, the City Attorney shall have access to the public records filed by the organization with the City Clerk.~~

~~4~~ 3. ~~The City Attorney may commence and maintain in a court of competent jurisdiction all proper and necessary actions and proceedings to prosecute any act prohibited by this chapter.~~ If the investigation conducted under subpara-

graph 1 demonstrates that probable cause exists to believe that a violation or violations under Section 100.05 exist, then the City Attorney shall institute an action to prosecute such violation or violations.

Section 7. That Section 100.07, Damages to Injured Persons, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.07. Damages to Injured Persons.

1. Nothing herein contained shall preclude any person aggrieved by a prohibited act under Secton 100.05

~~performed~~ committed by a charitable organization from commencing an appropriate action or proceeding ~~in the Circuit Court~~ under the laws of the State of Florida to recover compensatory damages.

Section 8. That Section 100.08, Notice to the Public About the Provisions of this Chapter, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.08. Notice to the Public About the Provisions of this Chapter.

The City Attorney shall ~~be empowered~~ to inform the public about the requirements of this chapter as applied to all charitable organizations soliciting funds in Clearwater, Florida. The City Attorney specifically has the authority to notify the public that the office is authorized to receive and investigate complaints relating to the violations of this chapter. The City Attorney shall give public notice of all convictions of charitable organizations violating the provisions of this chapter and the basis of these convictions.

Section 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 10. Should any part or provision of this ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not effect the validity of the ordinance as a whole, or any part thereof, other than the part declared to be invalid.

Section 11. This ordinance is adopted as an emergency ordinance, pursuant to Section 166.041(3)(b), Florida Statutes, and the Clearwater City Charter.

Section 12. The City of Clearwater hereby exempts itself from the provisions of Pinellas County Ordinance No. 82-38, and such ordinance shall not apply within the corporate limits of the City of Clearwater, Florida.

Section 13. It is hereby found, determined and declared that this ordinance is necessary and urgently needed for the preservation of the welfare of the citizens and inhabitants of the City of Clearwater, Florida, in that passage of this ordinance is needed to further narrow and refine the provisions of Chapter 100 of the Clearwater Code of Ordinances, which chapter is presently the subject of pending litigation and should therefore be addressed prior to the termination of such proceedings before the trial court, thereby preserving the existing public and compelling interest which calls for the creation of the chapter, and by reason of such fact, an emergency is hereby declared; and this ordinance shall

be in full force and effect immediately upon its passage. This ordinance shall automatically expire ninety (90) days from the date of its passage unless the ordinance is submitted during such time for consideration as a non-emergency ordinance.

Section 14. Notice of the proposed enactment of this ordinance has been properly advertised in a newspaper of general circulation in accordance with Section 166.041, Florida Statutes.

PASSED ON FIRST FIRST READING May 3, 1984

PASSED ON SECOND AND FINAL READING AND ADOPTED May 17, 1984

/s/ Kathleen F. Kelly
Mayor-Commissioner

Attest:

/s/ Lucille Williams
City Clerk

(3)

FILED
APR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Petitioner,

v.

CITY OF CLEARWATER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

Whether this case is ripe for decision when there are virtually no record facts, and no findings, on crucial issues, and neither petitioner nor any other person is threatened with imminent harm.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1553

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Petitioner,

v.

CITY OF CLEARWATER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

STATEMENT

I. INTRODUCTION

Respondents urge that the petition for certiorari be denied. In its present posture this case presents no question of national importance, no conflict among the circuits, and no error of law. Nor is there any threat of imminent harm to petitioners or any other person; by virtue of injunctions and the decisions of city officials, the challenged ordinance has never been and will not be enforced pending an appropriate decision in the trial court. Thus, currently the litigation presents only a correct appellate holding that the case is not ripe for decision because of the nearly total lack of a factual record and the lack of factual findings by the trial court. As discussed *infra*, this Court itself has made clear that a case is not ripe in such circumstances.

II. THE BACKGROUND OF THE CASE

A. The Nature And Purpose Of The Ordinance

This case involves a lengthily considered, carefully drafted ordinance enacted in response to a major problem facing Clearwater, Florida. The ordinance is a registration and disclosure law that requires all charitable groups, or organizations holding themselves out as charitable groups, to register and disclose pertinent information when soliciting funds in Clearwater. Sections 100.01, 100.03, Appendix To The Petition For A Writ Of Certiorari (hereafter "Pet. App."), J6-J8, J20-J27. Religious organizations are among the charitable groups encompassed by the ordinance. Sections 100.01(1), 100.01 (3), Pet. App. J6-J7, J8-J9.

The ordinance was enacted because of revelations of a host of serious crimes and abuses committed by a group operating in Clearwater. As a disclosure law, the ordinance was adopted to prevent fraud and to enable people to make an informed decision when determining whether to contribute money to soliciting organizations. This Court, of course, has said twice in the last six years that penal and disclosure laws can be used to stop fraud by eleemosynary organizations. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-638 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, —— U.S. ——, —— n.9, 104 S.Ct. 2839, 2850 n.9 (1984).

B. Events And Practices Leading To The Ordinance [1]

In 1975 the "Church" of Scientology made Clearwater one of its major worldwide bases. The "Church" then

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[1] As previously stated, the district court took almost no evidence and made no findings of fact. Necessarily, therefore, other sources provide the information set forth in this brief regarding events that led to the ordinance, practices of the "Church" of Scientology, and Clearwater's reasons for the ordinance. The other sources are the nearly fifteen hundred pages of transcript of legislative hearings held by the Clearwater City Commission, numerous judicial deci-

began bringing people to Clearwater from all over the world to take Scientology "training" and tens of millions of dollars per year in Scientology income began originating in Clearwater.

Scientology claims its "training" will cure mental and physical illnesses and enable individuals to achieve great heights of success. It promotes these claims in commercial literature and advertisements. In the main, the "training" consists of a process called auditing, in which the individual is hooked-up to a form of lie detector called an E-Meter. While attached to the E-Meter, the individual is asked all manner of questions by an interrogator, including questions about the most intimate and confidential details of life. The interrogators often are young and inexperienced persons with no training other than having been audited themselves for a short period of time. The charge for the "training" often runs between $5,000 and $80,000.

After the "Church" made Clearwater a major base, City officials began receiving complaints of illicit and questionable actions. There were complaints of fraud stemming from the failure of Scientology "training" to provide the promised benefits and from failure to give promised refunds. There were reports of spying upon reporters and officials. It was learned that Scientology had a cache of weapons in the Clearwater area, and that officials of Scientology had been convicted and imprisoned for serious crimes against the United States.

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sions of courts in this country and abroad, executive and legislative reports, and personal knowledge of Clearwater officials.

The transcript of the Clearwater hearings, the judicial decisions, and the legislative and executive reports were submitted to the court of appeals in an appendix. Such materials, plus the testimony of Clearwater officials, will be included in the evidence submitted at future evidentiary hearings in the district court.

A list of the judicial decisions which provide information is contained in the Appendix to this brief.

The situation became sufficiently serious that in May, 1982, the City Commission held extensive legislative hearings that took five days, cover nearly 1,500 pages of transcript, and were videotaped. There were sixteen witnesses, including experts on Scientology and thirteen former Scientologists, some of whom had held high positions in the "Church." There were sixty-one exhibits, a large number of which were documents from "Church" files detailing its regular policies and practices.

The hearings disclosed a staggering array of criminal and abusive acts, practices and policies of the "Church." The acts included burglarizing and bugging offices to obtain documents and information for use against critics, "framing" opponents by manufacturing and planting false evidence, blackmailing persons who left the "Church," beating, kidnapping and imprisoning persons who wished to leave it, fraudulently procuring money by false claims regarding the benefits of Scientology training, the availability of refunds and the supposed accomplishments of Scientology's founder, international smuggling of currency, extortion of money, attempted (and perhaps actual) murder, training Scientologists to commit crimes, lying to government officials, the use of harassing and threatening phone calls, violation of polygraph laws, misuse of the legal system to harass individuals by deliberately filing meritless suits against them, spying upon and attempting to infiltrate the offices of opponents, failure to provide proper food or medical attention to children, and failure to educate them.[2]

C. The Provisions Of The Clearwater Ordinance

After the hearings the City determined to draft a registration and disclosure law to combat fraud and diversion of funds for illicit purposes by eleemosynary or-

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[2] The policies and practices disclosed by the Clearwater hearings have also been found to exist by courts here and abroad. See cases listed in the Appendix.

ganizations or groups holding themselves out as eleemosynary, including educational, philanthropic, health, benevolent, humane, religious and other organizations. Sections 100.01(1), 100.01(3), Pet. App. J6-J7, J8-J9. The ordinance enacted by the City requires that, if such an eleemosynary organization wishes to solicit funds in Clearwater, it must file a registration statement disclosing specified information. Section 100.03, Pet. App. J20-J27. The disclosure provisions are very similar or identical to those contained in hundreds of state and local registration and disclosure laws that have been in force for decades all over the country, and are almost precisely identical to those of a Houston ordinance attacked by a religious group but upheld as facially constitutional in a recent Fifth Circuit decision authored by Judge John Minor Wisdom. *International Society For Krishna Consciousness Inc. v. City of Houston*, 689 F.2d 541 (5th Cir. 1982). The ordinance requires a registering organization to maintain records of documents necessary to file the registration statement. Section 100.04, Pet. App. J36.

When an organization files a registration statement, the City Clerk *must* issue a Certificate of Registration unless required information is missing from the statement. Section 100.03(2), Pet. App. J28-J29. If the Clerk does not issue a Certificate, the organization can solicit in Clearwater without one unless and until a court upholds the City Clerk's decision. Section 100.03(3), Pet. App. J29-J30. The City bears the burden of initiating the court proceedings, and in the proceedings the organization can show the missing information should not be required because furnishing it would work a special hardship on the organization. Sections 100.03(3), 100.03(4), Pet. App. J29-J32.

For the convenience of charitable groups, the law contains exemptions for organizations whose collections in Clearwater are very small, allows a group to register by merely filing a registration statement already filed else-

where that contains information similar to data required by Clearwater, and permits a group not to file a public registration statement if it solicits only from its own members and provides necessary information in a "private statement" available to the members. Sections 100.02(1), 100.03(6), 100.02(3), Pet. App. J15-J16, J33-J34, J18-J20.

The ordinance provides that specified willful, knowing or fraudulent acts shall be unlawful (e.g., willful failure to file a registration statement, willful failure to make promised refunds, and misrepresentations to obtain money or property). Section 100.05, J39-J43. The City Attorney is empowered to investigate violations of the ordinance, but only if he first receives ten bona fide, sworn complaints setting forth facts showing a violation. Section 100.06(1), Pet. App. J45. In an investigation he can issue subpoenas, Section 100.06(2), J45-J47, but he has been given no power to enforce them and therefore must go to court for enforcement. He can prosecute if an investigation shows "probable cause" to believe a violation exists. Section 100.06(3), Pet. App. J47-J48.

D. The Procedural History Of The Case In The District Court

Clearwater initially adopted a registration and disclosure ordinance on October 6, 1983. *Church of Scientology Flag Service Org. Inc., et al. v. City of Clearwater, et al.*, 777 F.2d 598, 600 (11th Cir. 1985), Pet. App. A5. On January 23, 1984, the "Church" of Scientology filed suit seeking to have the ordinance enjoined. *Id.*, 777 F.2d at 600, Pet. App. A6. Its complaint raised a number of constitutional claims, *ibid.*, but the heart of its case was and remains that it allegedly is a religious group whose freedom of religion assertedly is being impaired in violation of the free exercise and establishment clauses of the First Amendment.

The district court set March 9, 1984—a date only one and one-half months after suit was filed—as the day of a so-called "final hearing" on Scientology's request for a permanent injunction. *Id.*, 777 F.2d at 601, Pet. App. A7. The hearing was confined to the facial validity of the ordinance. *Id.*, 777 F.2d at 601, Pet. App. A7-A8. No evidence was received except for a brief stipulation, between the "Church" and the City, that Clearwater is a Florida municipality, that the "Church" is a Florida corporation that sells books and pamphlets and pays some Scientologists commissions on funds they solicit, and that subject matter jurisdiction and venue were proper. *Id.*, 777 F.2d at 601, Pet. App. A8-A9. At the hearing the City's trial counsel advised the court that Clearwater would not challenge the "Church's" standing except as to claims based on the religion clauses. *Id.*, 777 F.2d at 601, Pet. App. A9.

Because of contentions made at the March 9th hearing, on March 15, 1984 the City enacted a new, amending ordinance that repealed all inconsistent parts of the previous law. *Id.*, 777 F.2d at 601, Pet. App. A10. The City promptly notified the court and the plaintiffs of the new law. *Id.*, 777 F.2d at 601, Pet. App. A11. Though the prior ordinance was no longer effective, on March 28, 1984 the district court issued a ruling that it was unconstitutional on its face and permanently enjoined its enforcement. *Id.*, 777 F.2d 601, Pet. App. A11-A12. Clearwater appealed this ruling to the Eleventh Circuit on grounds that the district court should not have ruled on the validity of the first ordinance after it was repealed. *Id.*, 777 F.2d at 602, 604-607, Pet. App. A15, A25-A40.

On May 24, 1984, the "Church" filed a supplemental suit attacking the new, amending ordinance on the same grounds raised in its suit against the first ordinance. *Id.*, 777 F.2d at 602, Pet. App. A17. The district court set July 13, 1984—again only one and one-half months

after suit was filed—as the day for a so-called "final hearing" on the "Church's" request for an injunction against the new ordinance. *Ibid.* On June 14, 1984, a month before the hearing, the City moved to dismiss the case. See *id.*, 777 F.2d at 602-603, Pet. App. A18.

At the July 13th hearing, the City's trial counsel said it would not contest Scientology's standing at that time. *Id.*, 777 F.2d at 603, Pet. App. A19. The district court said it would consider only the facial validity of the ordinance and took no evidence at the hearing. *Id.*, 777 F.2d at 603, Pet. App. A18-A19. At the conclusion of the hearing the court ruled that the ordinance was constitutional on its face. *Id.*, 777 F.2d at 603, Pet. App. A20. It subsequently entered written orders to that effect and granted leave for an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.*, 777 F.2d at 603, Pet. App. A20-A21. Leave to appeal was similarly granted by an administrative panel of the Eleventh Circuit. *Id.*, 777 F.2d at 603, Pet. App. A21.

Because almost no evidence was received at the March 9, 1984 "final hearing" on the first ordinance, and no evidence at all was received at the July 13, 1984 "final hearing" on the amending ordinance, there are no record facts on issues that lie at the heart of the present case. There are no record facts on whether the "Church" of Scientology is a religion entitled to invoke the free exercise and establishment clauses of the First Amendment, as the "Church" contends, or is instead only a commercial and at times criminal organization not entitled to invoke the religion clauses, as the City contends. Nor are there record facts on whether, if Scientology *is* a religion, it would be heavily burdened by the disclosure requirements of the ordinance, as the "Church" contends, or could meet those requirements with little or no difficulty, as the City contends.[3] Finally, just as there are

[3] Clearwater's view received support in the Eleventh Circuit in an *amicus* brief filed by John J. O'Connor, who long was Vice

no record facts on these issues, neither are there district court findings on them.

E. The Decision Of The Eleventh Circuit

The Eleventh Circuit Court of Appeals issued an opinion on November 13, 1985. It vacated the district court's orders enjoining the first ordinance and instructed that the "Church's" suit against that ordinance be dismissed. *Church Of Scientology Flag Service Org., Inc., et al. v. City of Clearwater, et al., supra,* 777 F.2d at 604, 608, Pet. App. A27, A49. The Circuit held the trial court should not have ruled on the validity of the first ordinance after it had been repealed, since the suit over the first ordinance was then moot, and since the trial court's ruling violated this Court's policy against unnecessary decision of constitutional issues. *Id.,* 777 F.2d at 604-607, Pet. App. A26-A40. This holding of the Eleventh Circuit is not at issue here.

The Circuit also vacated the prior grants of leave to interlocutorily appeal the district court's decision that the second ordinance is constitutional; in this regard the

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President and General Counsel of the March of Dimes and has been actively involved in several umbrella organizations that oversee charitable giving. Mr. O'Connor said the type of information required by the Clearwater law is already required by the Internal Revenue Code and by the registration and disclosure laws of thirty-two states, is provided to the IRS and state governments by the March of Dimes, and is contained in the annual reports of at least a score of national charitable organizations with which he is personally familiar. *Brief Amicus Curiae of John J. O'Connor,* 6-7, 9-10. Mr. O'Connor stated that compliance with the disclosure requirements of the Clearwater ordinance "could not conceivably create an undue burden on charitable organizations soliciting funds for charitable purposes in the City of Clearwater. . . ." *Id.,* at 5. (For the convenience of the Court, three copies of Mr. O'Connor's brief have been lodged with the Clerk.)

appellate court held the case is not ripe for review. *Id.*, 607-608, Pet. App. A40-A46, A49. The Circuit said there is no record evidence on whether the "Church" had standing to bring its constitutional challenge and no factual findings on the question. *Id.*, 777 F.2d at 607, Pet. App. A41-A42; *see* 777 F.2d at 606, Pet. App. A35-A37. The district court, said the Circuit, should not have relied on any failure by Clearwater to contest Scientology's standing. *Ibid.* For standing is a matter of the case or controversy requirement of Article III, *id.*, 777 F.2d at 606, Pet. App. A37-A38, and the courts have a "constitutional obligation to ensure that the jurisdictional standing requirements were met." *Id.*, 777 F.2d at 607, Pet. App. A42-A43; *see* 777 F.2d at 606-607, Pet. App. A35-A40.

In addition, the Circuit felt "it would be unwise . . . to establish part of the law of the case at this time," because "[s]uch a decision could present difficulties for the district court and the parties beyond our ability to foresee as the case proceeds to a determination on the merits." *Id.*, 777 F.2d at 608, Pet. App. A45.

The Circuit felt its views require "special emphasis where a constitutional question is at issue." *Id.*, 777 F.2d at 608, Pet. App. 45-46. The Supreme Court's "deeply rooted doctrine" against unnecessary decision of constitutional questions, said the Circuit, "is particularly appropriate in this instance where no evidentiary or factual background is presented. . . ." *Id.*, 777 F.2d at 608, Pet. App. A46.

F. The Non Enforcement Of The Ordinance, And The Consequent Lack Of Any Threat Of Imminent Harm To Any Person

The Clearwater ordinance has not been enforced during the pendency of the litigation between Clearwater and the "Church," and will continue not to be enforced until an appropriate ruling on the merits in the trial court. Such a ruling would likely consist of a district

court decision upholding the ordinance after a full trial or other significant evidentiary proceedings.[4] Because the ordinance has not been enforced and will not be enforced until an appropriate decision, it has and continues to pose no threat of imminent harm to the "Church" or any other person.

The lack of enforcement has arisen from injunctions and decisions of City officials. When this litigation initially began, the "Church" requested a temporary restraining order against enforcement of the first ordinance. *Id.*, 777 F.2d at 600, Pet. App. A7. A TRO became unnecessary, however, because the City decided not to enforce the ordinance pending a final determination on its merits. *Id.*, 777 F.2d at 600-601, Pet. App. A7. Now, of course, the first ordinance has been repealed and *cannot* be enforced.

Because of the litigation, the City did not enforce the second ordinance between the date of its enactment, March 15, 1984, and the date the "Church" brought a supplementary suit against it, April 20, 1984. Thereafter, a temporary restraining order was in effect until July 23, 1984. *Id.*, 777 F.2d at 602, 603, Pet. App. A15-A16, A22-A23. On July 23d the district court, though it previously had upheld the facial validity of the law, enjoined enforcement of the provisions requiring registration and disclosure of information and maintenance of records. *Id.*, 777 F.2d at 603, Pet. App. A23-A24. Subsequently, when granting leave to appeal, an administrative panel of the Eleventh Circuit granted a motion to enjoin enforcement of the law pending decision on appeal. *Id.*, 777 F.2d at 604, Pet. App. A25. Though the latter

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[4] Continued lack of enforcement until a trial court decision assumes that this Court does not grant plenary review and uphold the ordinance. Were this Court to grant review and sustain the law, the City might then commence enforcement, depending on the extent of this Court's opinion.

injunction thereafter dissolved by its own terms when the Eleventh Circuit decided the case, the district court's July 13th injunction remains in effect. Thus, the registration, disclosure and recordkeeping provisions of the law are legally unenforceable at this time, and the City has determined that *no* part of the law will be enforced pending an appropriate decision in the trial court.

REASONS FOR DENYING THE WRIT

The Court of Appeals was correct in ruling this case is not ripe for decision. As indicated above, there are no record facts and no findings on whether Scientology is a religion, with consequent standing to invoke the freedom of religion clauses that the Court of Appeals correctly called "the heart" of Scientology's case. *Church of Scientology Flag Service Org. Inc., et al. v. City of Clearwater, et al., supra*, 777 F.2d at 606, Pet. App. A38. Nor are there record facts or findings on whether the Clearwater law would impose a significant burden on any group. Nor does the law present an imminent threat to any person. Finally, the Clearwater ordinance is consistent with numerous decisions of this Court and with the decision of the Fifth Circuit in the closely similar *City of Houston* case. In these circumstances, this case currently presents no issue of national importance, no conflict among circuits, no error, and no matter worthy of review by this Court.

I. The Case Is Not Ripe For Decision

This Court has pointed out that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy'," as well as "judicial restraint from unnecessary decision of constitutional issues." *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 138 (1974). Thus, "the Court may delay resolution of constitutional questions" until a time "when a better factual record might be available," or until factual developments will put the Court in a "better position . . .

to confront the validity" of a statute. *Blanchette v. Connecticut General Corps., supra,* 419 U.S. at 143, 145. See also, *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 82-83 (1978). The desirability of awaiting a better record is enhanced when a party will have "ample opportunity later to litigate . . . [the pertinent questions] after the factual record has matured." *Blanchette v. Connecticut General Insurance Corps., supra,* 419 U.S. at 146-147. Also, the Court will not decide a constitutional issue when a party is not "immediately threatened with harm," *Poe v. Ullman,* 367 U.S. 500, 503-504 (1961); or when a case is premature and abstract, *Rescue Army v. Municipal Court,* 331 U.S. 549, 574-575 (1947); or in " 'advance of the strictest necessity'." *Poe v. Ullman, supra,* 367 U.S. at 503; see also, *Sanks v. Georgia,* 401 U.S. 144, 151 (1971); *Rescue Army v. Municipal Court, supra,* 331 U.S. at 568.

These principles dictate that the instant case is not ripe for decision. Here there is no factual record and no findings on crucial issues. Such issues, in the words of the Eleventh Circuit, currently present only "abstract question[s] of law." *Church of Scientology Flag Service Org. Inc., et al. v. City of Clearwater, et al.,* 777 F.2d at 608, Pet. App. A44-A45. This Court will be in a much better position to confront the critical questions when there are record facts relating to whether the "Church" is a religious organization or only a commercial and sometimes a criminal one,[5] and to whether the disclosure requirements

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[5] Cf. *Alamo Foundation, et al. v. Secretary of Labor,* —— U.S. ——, 105 S.Ct. 1953 (1985). In *Alamo* a religious foundation urged that various of its activities were not covered by the Fair Labor Standards Act. The foundation unsuccessfully claimed in this regard that its businesses should not be considered to be ordinary commercial activities because they are "infused with a religious purpose" and are "vehicles for preaching and spreading the gospel to the public." *Id.*, —— U.S. at ——, 1055 S.Ct. at 1960. The lower courts, however, examined the activities to determine their true character, and this Court held those courts "were correct in

of the Clearwater law are easy to meet or burdensome. While the requisite factual record is being developed, neither the "Church" nor any other person will suffer harm, since the ordinance is not being enforced pending a suitable trial court decision. And the "Church" will have ample opportunity to litigate the crucial issues in the trial and appellate courts after development of a factual record.

The "Church" seeks to circumvent the lack of ripeness by urging that standing requirements are relaxed for facial challenges under the First Amendment. *Petition For Certiorari*, 10-14. Thus, says the "Church", a greatly reduced factual showing will suffice for standing here, a factual showing that is met by means of the allegations of the "Church's" complaint and stipulations assertedly entered by Clearwater. *Ibid.*

The "Church's" position is untenable. A party cannot *ipso facto* confer standing on itself by means of allegations in its complaint. Nor can standing or ripeness be conferred by stipulation or concession. Rather, this Court has taken pains to make clear that, because standing and ripeness are in part a matter of whether a judicially cognizable case or controversy exists under Article III, a federal court must independently satisfy itself that standing exists and that a case is ripe, and must do so regardless of any concessions or stipulations. *Secretary of State of Maryland v. Munson*, —— U.S. ——, —— n.4, 104 S.Ct. 2839, 2846 n.4; *Kremens v. Bartley*, 431 U.S. 119, 135-136 (1977); *Juidice v. Vail*, 430 U.S. 327, 331 (1977); *Blanchette v. Connecticut General Insurance Corps., supra*, 419 U.S. at 356; *Doremus v. Board of Edu-*

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scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope." *Id.*, —— U.S. at ——, 105 S.Ct. at 1960-1961. In the present case Scientology's actions must likewise be "scrutiniz[ed] . . . by reference to objectively ascertainable facts" in order to determine the true character of the actions.

cation, 342 U.S. 394, 397 (1952). Independent judicial examination and decision are also required because considerations of judicial restraint come into play. *Blanchette v. Connecticut General Insurance Corps., supra*, 419 U.S. at 138.[6]

The principles that make the "Church's" position untenable have been strongly reiterated by this Court as recently as March 25, 1986 in a case involving freedom of religion and speech. *Bender, et al. v. Williamsport Area School District, et al.*, No. 84-773, decided March 25, 1986, 54 L.W. 4307. In *Bender*, no one had raised any question in the Third Circuit regarding a school board member's standing to appeal. *Id.*, 54 L.W. at 4308. However, this Court vacated the Circuit's judgment and ordered dismissal of the appeal because of lack of standing. *Id.*, 54 L.W. at 4310.

In words that parallel the decision of the Eleventh Circuit in the present case, the Court in *Bender* said "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. . . . And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it." *Id.*, 54 L.W. at 4308.

Again paralleling the views of the Eleventh Circuit, the Court went on to emphasize that "[t]his obligation to

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[6] In addition to arguing that standing has been conferred by stipulation, the "Church," relying on *Larson v. Valente*, 456 U.S. 228 (1982), argues that Clearwater cannot apply its ordinance to Scientology, yet simultaneously deny that Scientology is a bona fide religion with standing to invoke the free exercise and establishment clauses. *Petition For Certiorari*, 11-12. The argument is erroneous. Here, unlike *Larson v. Valente*, the relevant provisions of the ordinance apply not only to bona fide religious groups, but to groups that *hold themselves out* as religions. The ordinance is therefore applicable to a group which falsely claims to be but in fact is not a religion, and which therefore lacks standing to invoke the religion clauses.

notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of . . . a full development of the relevant facts." *Id.*, at 4308-4309. In this regard, the Court stressed that it had "frequently recognized the importance of the facts and the factfinding process in constitutional adjudication," and that " '[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' " *Id.*, 54 L.W. at 4309 n.5. The Court pointed out that "[T]he legal questions presented to the court [should] be resolved not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.' " *Id.*, 54 L.W. at 4309.

The facts essential to a determination of standing, repeatedly said the Court, "must affirmatively appear in the record." *Id.*, 54 L.W. at 4310. "Moreover, because it is not 'sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings,' . . . it follows that the necessary factual predicate may not be gleaned from the briefs and arguments themselves." *Ibid.*

The decision in *Bender* thus confirms that the present case is inappropriate for review at this time. For *Bender* stresses the need for a full development of the facts, a need for record facts regarding standing, and the impermissibility of relying on concessions concerning standing. But here there has been no significant development of the facts, there are almost no record facts at all regarding standing, and there is only an alleged concession concerning it.

Finally, even if standing could be conferred merely by a complaint and stipulation, this case still would not be ripe because there are no record facts and no findings on

the additional issue of whether the ordinance imposes a significant burden on petitioner or any other group.[7]

II. The Clearwater Ordinance Comports With Decisions Of This Court

Review also is unwarranted because, even if Scientology were a religion, the Clearwater ordinance is consistent with long established principles enunciated by this Court.

A. *Government Can Prohibit And Punish Crime And Antisocial Conduct Even When Committed In The Name Of Religion*

As discussed above, the Clearwater ordinance was enacted because extensive legislative hearings revealed that criminal and antisocial conduct, including extensive fraud, were being perpetrated on a vast scale by the "Church." This Court and lower federal courts have held for over one hundred years that government has power to and a compelling interest in acting against such conduct even when committed in the name of religion. "Crime," this Court has said, "is not the less odious because sanctioned by what any particular sect may designate as religion."

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[7] This Court's prominent cases on the facial validity of statutes and ordinances have usually had highly developed factual records. Several of the cases came to the Court after a trial—often an extensive trial—on the merits. E.g., *Kolender v. Lawson*, 461 U.S. 352, —— n.2, 103 S.Ct. 1855, 1856 n.2 (1983); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 493 (1982); *Bigelow v. Virginia*, 421 U.S. 809, 813-814 (1975); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 553 (1973); *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972); *Gooding v. Wilson*, 405 U.S. 518, 519 (1972); *see, Broadrick v. Oklahoma*, 413 U.S. 601, 603 (1973). Others of the cases came to the Court after motions for summary judgment supported by evidence which was sometimes obtained through discovery. E.g., *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, —— U.S. ——, ——, 104 S.Ct. 2118, 2123 (1984); *Larson v. Valente*, 456 U.S. 228, 234 (1982). Thus, petitioner's implication that a factual record has been thought unnecessary is belied by the cases themselves.

Davis v. Beason, 133 U.S. 333, 345 (1980). "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country. . . ." *Id.* at 342-343. Otherwise, "the professed doctrines of religious belief [would be] superior to the law of the land," and the result would be "to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

The principles established in *Davis* and *Reynolds* have been followed ever since. Accordingly, this Court and other tribunals have often stressed that activities, "even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety and general welfare." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). " 'The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.' " *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983). For these reasons, numerous actions that violate civil or criminal laws can be prohibited or punished though based upon or demanded by religion. Polygamy can be banned. *Reynolds v. United States, supra*; *Davis v. Beason, supra.* Child labor can be barred. *Prince v. Massachusetts*, 321 U.S. 158 (1944). Nonpayment of taxes can be precluded and punished. *United States v. Lee*, 455 U.S. 252 (1982); *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. den.*, —— U.S. ——, 104 S.Ct. 2344 (1984). Racial discrimination can be disadvantaged by denial of tax exemptions. *Bob Jones University v. United States, supra.* The use of marijuana, LSD and peyote can be punished, *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968); *State v. Ballard*, 148 S.E. 2d 565 (N.C. 1966), *cert. den.*, 386 U.S. 917 (1967). Parents can be punished for failing to provide children with necessary medical attention. *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903). The use of poisonous snakes in religious services can be forbidden.

Harden v. State, 216 S.E. 2d 708 (Tenn. 1948). Violations of zoning laws can be prohibited. *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. den.*, —— U.S. ——, 105 S.Ct. 108 (1984); *Lakewood, Ohio Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. den.*, —— U.S. ——, 104 S.Ct. 72 (1983). And the marketing of wheat in excess of quotas can be barred. *United States v. Kissinger*, 250 F.2d 940 (3rd Cir. 1958), *cert. den.*, 356 U.S. 956 (1958).

Also among the actions which can be prohibited and punished are fraud and other crimes committed in connection with the solicitation of funds by religious and other charitable groups. *Secretary of State of Maryland v. Munson, supra*, —— U.S. at —— n.9, 104 S.Ct. at 2850 n.9; *Larson v. Valente, supra*, 456 U.S. at 248; *Village of Schaumburg v. Citizens for a Better Environment, supra*, 444 U.S. at 637-638; *Hynes v. Mayor and City Council of Borough of Oradell*, 425 U.S. 610, 618-619 (1976); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1981), *cert. den.*, 454 U.S. 1157 (1982); *International Society for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981). Indeed, in the last six years this Court has twice pointed out that penal laws and disclosure laws can be used to stop fraud by eleemosynary organizations. *Village of Schaumburg v. Citizens for a Better Environment, supra*, 444 U.S. at 637-638; *Secretary of State of Maryland v. Munson, supra*, —— U.S. at —— n.9, 104 S.Ct. at 2850 n.9. As the Court said in *Schaumburg*, 444 U.S. at 637-638:

> Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed,

while leaving to individual choice the decision whether to contribute. . . ." (Citations and footnotes omitted.)

Furthermore, when a religious organization recently attacked a Houston ordinance containing disclosure provisions nearly identical to the Clearwater law, the Fifth Circuit upheld the Houston law as constitutional on its face. *International Society for Krishna Consciousness v. City of Houston, supra.* The Fifth Circuit pointed out that this Court has said a municipality's interest in "protecting the public from 'fraud [and] crime . . .'" perpetrated by charitable solicitors is " 'substantial,' " 689 F.2d at 550, see *id.*, 549 n.6, and has also said, as quoted above, that " 'Efforts to promote disclosure of finances of charitable organizations also may assist in preventing fraud by informing the public.' " *Id.* at 550.

Thus Clearwater's registration and disclosure law, aimed at fraud and other abuses committed in connection with solicitation, is supported by a long line of precedents under which government can act against conduct that violates criminal and civil laws.

B. *It Is Erroneous To Argue That Crime And Antisocial Conduct Are Immune From Regulation Because Government Lacks Power To Affect The Relationship Between A Church And Its Members Or To Require Information From Hierarchical Religions*

The "Church" seeks to evade governmental power to prevent criminal and antisocial conduct by arguing that government cannot in any way affect the relationship between a church and its members. *Petition For Certiorari*, 14-17. The argument is incorrect in law and is significantly inapplicable on the facts.

It is erroneous in law because, if government could not preclude illicit conduct occurring as part of the relationship between a church and its members, the result "would be to make the professed doctrines of religious belief su-

perior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds v. United States, supra*, 98 U.S. at 167 (quoted in *Davis v. Beason, supra*, 133 U.S. at 344). Thus, a large number of the cases holding that government can bar and punish antisocial conduct based on religion have solely or extensively involved the relationship between a church and its members. This was true of cases involving polygamy, child labor, fraud against members of a religion, the use of hallucinagenic drugs, failure to give medical attention to children, non-payment of taxes on grounds that payment violated tenets of a religion, and the use of deadly snakes at religious services.

The argument is significantly inapplicable on the facts because the "Church" deals extensively with members of the public. The "Church" advertises to members of the public, tries to obtain money from them, and seeks to entice them into its "training" programs.

The "Church" also seeks to evade governmental power to stop crime by urging that government cannot require information from a hierarchically structured church that does not impart data to members. *Petition For Certiorari*, 16-17. This argument, too, is flawed. As discussed *infra*, in order to deter and punish crime and abuse, including fraud, government can and regularly does require religious organizations to disclose information regardless of the organizations' structure. If government could *not* require information from hierarchically structured groups, then such groups would be above the law and could commit fraud and other crimes with impunity.[8]

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[8] Cases cited by the "Church" in support of its argument that government cannot require information from hierarchical groups (e.g., *Serbian Eastern Orthodox Diocese, Etc. v. Milivojevich*, 426 U.S. 696 (1976)), did not involve criminal or antisocial conduct, and this Court has never said the state must defer to hierarchical decisions requiring such conduct. The Court's opinions have been to the contrary.

III. The Ordinance Does Not Require Unusual Amounts Of Information. Also, It Is Not Vague Or Overbroad And Does Not Repose Arbitrary Power In City Officials

In an additional effort to evade governmental power to deter criminal and antisocial conduct, the "Church" claims the Clearwater ordinance requires charitable groups to gather, maintain and disclose "enormous" amounts of information (*Petition For Certiorari*, 17) and further claims the ordinance is vague, overbroad and lodges unlawful discretion in city officials. *Id.*, 3-4, 17-18, 19. The "Church's" claims are erroneous.

A. The provisions of the Clearwater ordinance do not require unusual or particularly heavy amounts of information. Rather, the disclosure requirements of the law—and thus the data that must be gathered and maintained—are similar or identical to the requirements of a host of state and local laws that have been in force around the country for decades and have long been met by charitable groups. Accordingly, in the Eleventh Circuit Clearwater cited ten state statutes that require amounts of information similar to or identical with that demanded by Clearwater,[9] lodged with the court four local ordinances that do the same,[10] and cited eleven other state statutes requiring information of the type required by Clearwater.[11]

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[9] Conn. Gen. Stat. Ann. § 21a-177 (West Supp. 1983); Ill. Ann. Stat. Ch. 23, §§ 5102, 5104 (Smith-Hurd); Kan. Stat. §§ 17-1740, 17-1742; Me. Rev. Stat. tit. 9, §§ 5004, 5005; Mass. Ann. Laws, Ch. 68, § 19 (Michie/Law Co-op); N.C. Gen. Stat. § 131C-7 (1983 Supp.); N.D. Cent. Code §§ 50-22-03, 50-22-04; Pa. Stat. Ann. tit. 10, § 160-3 (Purdon); R.I. Gen. Laws § 5-53-2 (Supp. 1984); Va. Code § 57-49.

[10] The ordinances were those of Dallas, Texas, Los Angeles, California, Alexandria, Virginia and Jacksonville, Florida.

[11] Ark. Stat. Ann. §§ 64-1602, 64-1603; Ga. Code Ann. §§ 43-17-2, 43-17-4; Haw. Rev. Stat. § 467B-2; Md. Ann. Code Art. 41, § 103B; Mich. Comp. Laws Ann. §§ 400.273, 400.284; Minn. Stat. Ann. §§ 309.52, 309.53; Okla. Stat. Ann. tit. 18, §§ 552.3, 552.5 (West);

Furthermore, the disclosure requirements of the Clearwater law are virtually identical to those the Fifth Circuit recently upheld against facial attack by a religious group in the *City of Houston* case, *supra*. Also, the Internal Revenue Code requires charitable groups to maintain and disclose information as or far more extensive than required by Clearwater, 26 U.S.C. 6033(a)(1); 26 C.F.R. 1.600-1(a) and (c); and federal tax cases have required religious groups to disclose vast amounts of information. *United States v. Coates*, 692 F.2d 629 (9th Cir. 1982); *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981), *cert. den.*, 456 U.S. 983 (1982); *United States v. The Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

Finally, far from requiring "enormous" and burdensome amounts of information, the disclosure requirements of the Clearwater ordinance are easily met. This was shown by example at pages 72-76 of Clearwater's Eleventh Circuit brief. Three copies of the brief have been lodged with the Clerk in case this Court should wish to see how simply the disclosure provisions can be satisfied.

For all the above reasons, the amount of information required by Clearwater is plainly permissible.

B. The Clearwater ordinance is not vague or overbroad and does not vest unconstitutional discretion in officials. Rather, it satisfies the "practical criterion of fair notice," *American Association v. Douds*, 339 U.S. 382, 412 (1950); and "does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, *supra*, 461 U.S. at 357. All this is emphasized by the fact that its disclosure provisions are very similar or identical to those of numerous disclosure laws that have been enforced and met for decades, are nearly identical to those

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Ohio, Rev. Code Ann. §§ 1716.02, 1716.04 (Page); N.J. Stat. Ann. §§ 45:17A-4, 45:17A-6 (West); N.Y. Exec. Law §§ 172, 172-b (McKinney); W. Va. Code § 29-19-5.

specifically upheld against vagueness and overbreadth attacks in the *City of Houston* case, *supra*, and can be easily complied with. Also, directly contrary to the "Church's" spurious claim that the City Clerk has arbitrary discretion to deny a Certificate of Registration "'for any reason'," *Petition for Certiorari*, 19, the ordinance specifically requires that the Clerk *must* issue a Certificate unless required information has not been provided.

Finally, and contrary to the "Church's" false argument that the City Attorney has unfettered and arbitrary discretion, *id.*, 19-20, the ordinance, using standard legal terminology, precludes him from investigating unless he receives ten "bona fide" sworn complaints setting forth facts showing a violation, gives him no power to enforce subpoenas and thus makes it necessary for him to go to court for enforcement, and precludes him from instituting a prosecution unless investigation shows "probable cause" to believe a violation exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

JUDICIAL DECISIONS PROVIDING INFORMATION ON ACTIONS AND POLICIES OF THE "CHURCH" OF SCIENTOLOGY

1. *United States v. Heldt, et al.*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. den.*, 456 U.S. 926 (1982).

2. *Church of Scientology of California v. Richardson*, 437 F.2d 214 (9th Cir. 1971).

3. *Wakefield v. The Church of Scientology of California*, No. 82-313 CIV-T-10, decided February 11, 1986, D.M.D. Fla.

4. *Church of Scientology of Minnesota v. Dept. of H.E.W.*, 341 F. Supp. 563 (D. Minn. 1971), *aff'd*, 459 F.2d 1044 (8th Cir. 1972).

5. *United States v. Article Or Device, Etc.*, 333 F. Supp. 357 (D.D.C. 1971).

6. *Church of Scientology of California v. Commissioner*, 83 T.C. No. 25 (September 24, 1984).

7. *Church of Scientology of California v. Armstrong*, No. C 420153, Cal. Super. Ct., June 20, 1984.

8. Re: *B and G (Wards)*, Eng. Royal Cts. of Justice, High Court of Justice, 1984 (Latey, J.), appeal dismissed, *re "B" and "G" (Minors)*, Supreme Court of Judicature, Court of Appeal, September 19, 1984.

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No. 85-1553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Petitioner,

—against—

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, and LUCILLE WILLIAMS, City Clerk of the City of Clearwater,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Introduction

Petitioner (hereinafter the "Church") submits this reply brief to correct the numerous misstatements of fact and law in Respondents' Brief in Opposition. Primary among the misstatements of fact relied upon by respondents, is their summary of the alleged misdeeds committed by the Church. See Brief in Opposition at 2-4. First, it should be emphasized that there are no facts or evidence in the record which support any of respondents' outrageous and unfounded allegations. See Brief in Opposition at 2 n.1. Thus, it is entirely inappropriate—indeed, unprofessional—for respondents to make these allegations here in an effort to support their argument that the Clearwater ordinance was enacted to further a legitimate governmental

interest. Moreover, it is no coincidence that these facts are not in th erecord. For it was respondents who insisted to the district court that no evidentiary materials were relevant to the question of the facial validity of the ordinance. Indeed, respondents even went so far as to file a motion *in limine* to prohibit the use of evidentiary materials or the introduction of testimony.

Finally, and most importantly, even if these purported "facts" are accepted, *arguendo*, as true at the present stage of the case, they are irrelevant to a determination of the facial validity of the Clerwater ordinance. As is evident from comparing the alleged purpose of the ordinance to its requirements, there is no rational relationship between the "evils" which respondents claim the ordinance was intended to prevent and the provisions of the ordinance which address only solicitation practices. Thus, these purported facts would in no way justify the City's unconstitutional intrusion into the peaceful relationships between churches and their members.

ARGUMENT

I.

The Cases Cited by Respondents Have No Bearing on Whether Petitioner Has Established Facts Sufficient to Confer Standing on It to Bring a Facial Challenge to Clearwater Ordinance No. 3479-84.

In arguing that the facts which have been pled and proven by the Church to establish its standing to bring a facial challenge to ordinance no. 3479-84 are not sufficient to confer jurisdiction on this Court to adjudicate the weighty and important constitutional claims raised herein, respondents confuse and incorrectly interchange different and distinct principles of Article III jurisdiction which have no relevance to the instant case. Respondents have failed to show that the standing requirements for

facial challenges brought under the First Amendment have not been satisfied here.

None of the cases cited by respondents involve facial challenges brought under the First Amendment. Respondents have not even attempted to address the cases discussed in the Petition (at 9-14) holding that there are relaxed standing requirements for such facial constitutional challenges. The one case cited by respondents which involves standing in the context of a challenge brought under the religion clauses of the First Amendment, *Bender, et al. v. Williamsport Area School District, et al.*, —— U.S. ——, 54 L.W. 4307 (March 25, 1986), involved a claim that the challenged activity was unconstitutional *"as applied"*, not on its face. Thus, this case is similarly inapposite. For in an "as applied" challenge, *unlike a facial challenge*, the particular facts of the activity prohibited and the reasons therefore must be considered in order to resolve the constitutional claims. Indeed, this is what distinguishes an "as applied" challenge from a "facial" challenge.[1]

Thus, as demonstrated in our opening brief, the religious nature of the Church and of its solicitation activities, as well as the particular burden imposed on it as a result of the registration requirement, is simply irrelevant to the question of whether the Church has standing to raise the claims at issue herein.[2]

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[1] *Bender* is further distinguishable, because there, unlike in the instant action, the plaintiff not only did not allege any facts which conferred standing on him in his complaint, let alone—as here—by affidavit, but did not even assert these facts until oral argument in the Supreme Court. 54 L.W. at 4310. In the present case, the facts giving rise to standing, as asserted in the Church's verified complaint, were properly found to be true by the district court when the City stipulated in open court not to challenge standing.

[2] Respondents' additional argument that this Court should not address the constitutional issues raised herein because petitioner

(footnote continued on following page)

II.

The Clearwater Ordinance Is Unique Among Charitable Solicitation Ordinances and Contravenes Over a Century of Constitutional Law.

Respondents strain to characterize the Clearwater ordinance as one which comports with decisions of this Court, the circuit courts, and which is nearly identical to numerous other solicitation ordinances presently in effect throughout the states and municipalities of this country. In so doing, however, respondents seek to gloss over the fact that the Clearwater ordinance, unlike any other charitable solicitation ordinance, regulates relationships between charitable organizations and their own members. Nowhere else in the United States, either now or, we believe, at any time in its history, has a governmental entity attempted to require a church to seek government approval and meet government imposed registration and disclosure standards before it passes a collection plate among its own parishioners.

It is because of this aspect of the Clearwater ordinance that the ordinance cannot be compared to the other solicitation ordinances enacted by local governments. Indeed, a review of the state and local solicitation ordinances which respondents claim are nearly identical to the Clear-

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(footnote continued from previous page)

is not immediately threatened with harm due to the fact that there is presently a partial injunction in effect, is both illogical and irrelevant. The fact that the entire ordinance may not be enforced until a decision on the merits of the Church's facial and as applied challenges is issued does not preclude this Court or any other federal court from addressing the merits of the Church's claim. Under the respondents' theory, any time an injunction is issued prior to a final decision on the merits of a litigant's claim the litigant would thereby be precluded from establishing the necessary threatened injury to satisfy the standing requirement, and thus would never be able to obtain a decision on the merits of its claim.

water ordinance graphically illustrates this point. The overwhelming majority of the statutes and ordinances cited by respondents specifically exempt from their coverage solicitation by organizations (both religious and charitable) of their own members.[3] Moreover every statute or ordinance cited by defendants which does not exempt solicitations of members, broadly exempts regulation of religious solicitation altogether.[4] Thus, no governmental entity, other than Clearwater, has asserted an interest in regulating church-member solicitations.[5]

Nor has this Court, or any other court, ever upheld against a constitutional challenge a solicitation ordinance similar to the Clearwater ordinance. Although this Court approved, in *dicta*, of disclosure laws as a means of regulating charitable solicitation in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 637-38

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[3] *E.g.*, Ark. Stat. Ann. § 64-1604; Conn. Gen. Stat. Ann. § 21a-178(8), 16; Ga. Code Ann. § 43-17-18(4); Haw. Rev. Stat. § 467B-1(6); Ill. Ann. Stat. § 5103(2); Kan. Stat. § 17-1741(2); Me. Rev. Stat. Tit. 9 § 5006(A); Md. Ann. Code Art. 41 § 103(c)(5); Mass. Ann. Laws Ch. 68 § 20(8); Mich. Comp. Laws Ann. § 400.272(c); Minn. Stat. Ann. § 309.51(b); N.J. Stat. Ann. § 45.17A-5(b)(2); N.Y. Exec. Law § 172-a(2)(b); Ohio Rev. Code Ann. § 1716.03(B)(2); Okla. Stat Ann. Tit. 18 § 552.4(3); Pa. Stat. Tit. 10 § 160-4(3) (only short-form required); R.I. Gen. Laws § 5-53-3(2); Va. Code § 57-60(4); W. Va. Code § 29-19-6(5); Alexandria City Code § 9-10-1; Dallas City Code § 42-3(c)(1); Jacksonville City Code § 694.101(2); Los Angeles City Code § 44.16.

[4] N.C. Gen. Stat. § 131C-5(a); N.D. Cent. Code § 50-20-01(1).

[5] The federal tax statute cited by respondents similarly exempts religious organizations from filing and record keeping requirements. 26 U.S.C. § 6033(a)(2) exempts "(1) churches, their integrated auxiliaries, and conventions or associations of churches" and "(iii) the exclusively religious activities of any religious order" from the filing and record-keeping requirements of § 6033(a)(1). In addition, other sections of the Code provide additional protections for religious organizations. Under 26 U.S.C. § 7611, the Secretary's authority to conduct examinations or investigations of taxpayers books is severely restricted if the taxpayer is a religious organization.

(1980) and *Secretary of the State of Maryland* v. *J.H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 2850 n.9 (1984), neither of these cases support the sort of disclosure law at issue herein. First, neither *Schaumburg* nor *Munson* involved the application of a disclosure law to a religious organization and thus this Court was not confronted with the free exercise and establishment clause problems such laws create. In addition, in neither *Schaumburg* nor *Munson* was there any attempt to regulate solicitations from members or any attempt to compel disclosure of expenditures donated by members. Thus, this Court's approval of disclosure laws was limited to funds solicited from members of the public.

Respondents' reliance on *International Society for Krishna Consciousness* v. *City of Houston*, 689 F.2d 541 (5th Cir. 1982) is similarly misplaced. Not only did the City of Houston specifically exempt from its regulation solicitations by churches of their own members and/or upon their own premises, 689 F.2d at 562, but the court of appeals emphasized this exemption in holding that the ordinance was constitutional:

> There is no disclosure required except as it specifically relates to the raising of funds from the public. No membership lists are required; no names of contributors are sought; no information is asked about funds raised from members; nothing must be revealed regarding proselytizing of new members. Significantly, too, no dilemma is posed to an organization forcing it to decide whether to remain totally private or, by making public solicitations, reval publicly all aspects of its operations. The internal operations of the organization, apart from its public solicitations, remain under the veil of privacy. All that is mandated is disclosure to the public about those funds which are solicited from the public.

689 F.2d at 556.

Indeed, it is not surprising that no other governmental entity or court has ever enacted or approved of a disclosure law similar to the Clearwater ordinance. For well over a century, this Court has held that religious activities within a church are and must be free of government intrusions, except where a member is in danger of his life or serious physical harm, or where the activities of the church substantially collide with liberties or rights of the public. *Watson* v. *Jones*, 13 Wall (80 U.S.) 666 (1872). *See Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). The activity regulated by the Clearwater ordinance clearly falls within the core of protected activity under the *Watson* rule. By no stretch of the imagination can the passing of the collection plate by a church among its members be deemed to involve either the public or to pose a threat of serious physical harm to a member. The cases relied on by respondents to support such government interference, on the other hand, clearly fall into the exception to the *Watson* rule.

Thus, the polygamy cases concerned not merely the relationship between church members, but the formal request of the church and its members for state license and sanction of the relationship. The state's interest in refusing to license polygamy was upheld because the Court found that the nature of the marital relationship is central to the entire structure of civilized society. *Reynolds* v. *United States*, 98 U.S. 145, 165-166 (1878); *Davis* v. *Beason*, 133 U.S. 333, 344 (1890).

Similarly courts have upheld statutes regulating the marketing of wheat, residential zoning and tax exemptions despite their impact on religious activity because the activity regulated affected the public,[8] or posed a serious

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[8] *United States* v. *Kissinger*, 250 F.2d 940 (3rd Cir. 1958) *cert. denied*, 356 U.S. 956 (1958) (Agriculture Adjustment Act which limited amount of wheat farmers could market affected market

(footnote continued on following page)

threat of physical harm or death.[7] Thus, none of the cases relied on by respondents establish a right for the government to interfere with the peaceful solicitation of donations by churches of their own members.

The City attempts to justify the ordinance by recitation of a laundry list of purported crimes and "anti-social acts," which, as we have seen, are wholly without support in the

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(footnote continued from previous page)

price of wheat); *Gross* v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied* 105 S. Ct. 108 (1984) and *Lakewood, Ohio Corp. of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 72 (1983) (activity regulated involved the congregating of significant numbers of people, destroying the residential nature of the neighborhood and thus directly affecting the public, *Bob Jones University* v. *United States*, 461 U.S. 574 (1983) (denial of tax exempt status to segregated schools upheld to further governmental interest in eradicating racial discrimination in our society); *United States* v. *Lee*, 455 U.S. 252 (1982) (court denied religious exemption for payment of social security tax because such an exemption would undermine entire federal tax system).

Respondents' reliance on *United States* v. *Moon*, 718 F.2d 1210 (2nd Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984) is misplaced. Moon was convicted for non-payment of taxes on *personal* income which was not held for religious purposes. Thus, the First Amendment protection for religion was not implicated.

[7] *Harden* v. *State*, 216 S.W. 2d 708 (Tenn. 1984) (court upheld law prohibiting use of poisonous snakes in religious services); *People* v. *Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903) (court upheld conviction of parent for failure to provide medical care for his child, resulting in child's death).

Only where the state has a special responsibility to protect those who cannot protect themselves can the state regulate religious activities which pose a less substantial threat of harm to the member. Thus, in *Prince* v. *Massachusetts*, 321 U.S. 158 (1948), this Court upheld the prohibition of the sale of religious documents by children, under the child labor laws. Although this Court recognized the importance of the state's interest in enforcing the child labor laws to ensure "the healthy, well-rounded growth of its young people," *id.* at 168, this Court noted that without its coordinate *parens patriae* power, an interest of this magnitude would not be adequate to override countervailing First Amendment rights. *Id.* at 167.

record or reality. Even if respondents' unsupported allegations of misdeeds are credited, *arguendo*, they in no way support the unprecedented intrusion into the relationship between churches and their members effectuated by the Clearwater Ordinance.

In order to justify a burden on First Amendment rights, the state must "convincingly show a substantial relationship between the information sought and a subject of overriding and compelling state interest." *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972) quoting from *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539, 546 (1963). The Clearwater ordinance bears no "reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Id.* It hardly warrants explanation that an ordinance which purports to regulate solicitations by churches of their members by means of a complex and detailed licensing scheme could not possibly affect such activities as burglaries, kidnapping, framing of opponents, etc. Thus, to the extent that Clearwater has an interest in combatting these activities, it is not furthered by the instant ordinance and accordingly cannot survive constitutional scrutiny.[8]

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[8] Clearwater, of course, has at its disposal the usual methods for protecting its citizens against the crimes it lists in its brief, *i.e.*, criminal investigation and prosecution. Not only are the criminal laws a more direct and effective method of combatting such crimes than a compelled registration and disclosure ordinance concerning the voluntary donations of members to churches, but they further the government's interest by means less restrictive of First Amendment rights: Only criminal acts and criminals are affected, unlike the Clearwater ordinance which interjects City officials into every act of church giving by every church member in the City. The fact that the City of Clearwater and the State of Florida have never even criminally charged—let alone convicted—the Church or its members with any of the crimes gratuitously waived before the Court by the City, demonstrates that the City's laundry list of horribles not only is without record support, but untrue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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